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Liability of Local Governments for Earthquake Hazards and Losses

A Guide to the Law and its Impacts in the States of California, Alaska, Utah and Washington

Association of Bay Area Governments

February 1989

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Final Report

LIABILITY OF LOCAL GOVERNMENT FOR EARTHQUAKE HAZARDS AND LOSSES

A GUIDE TO THE LAW AND ITS IMPACTS IN THE STATES OF CALIFORNIA, ALASKA, UTAH & WASHINGTON

February 1989

Association of Bay Area Governments

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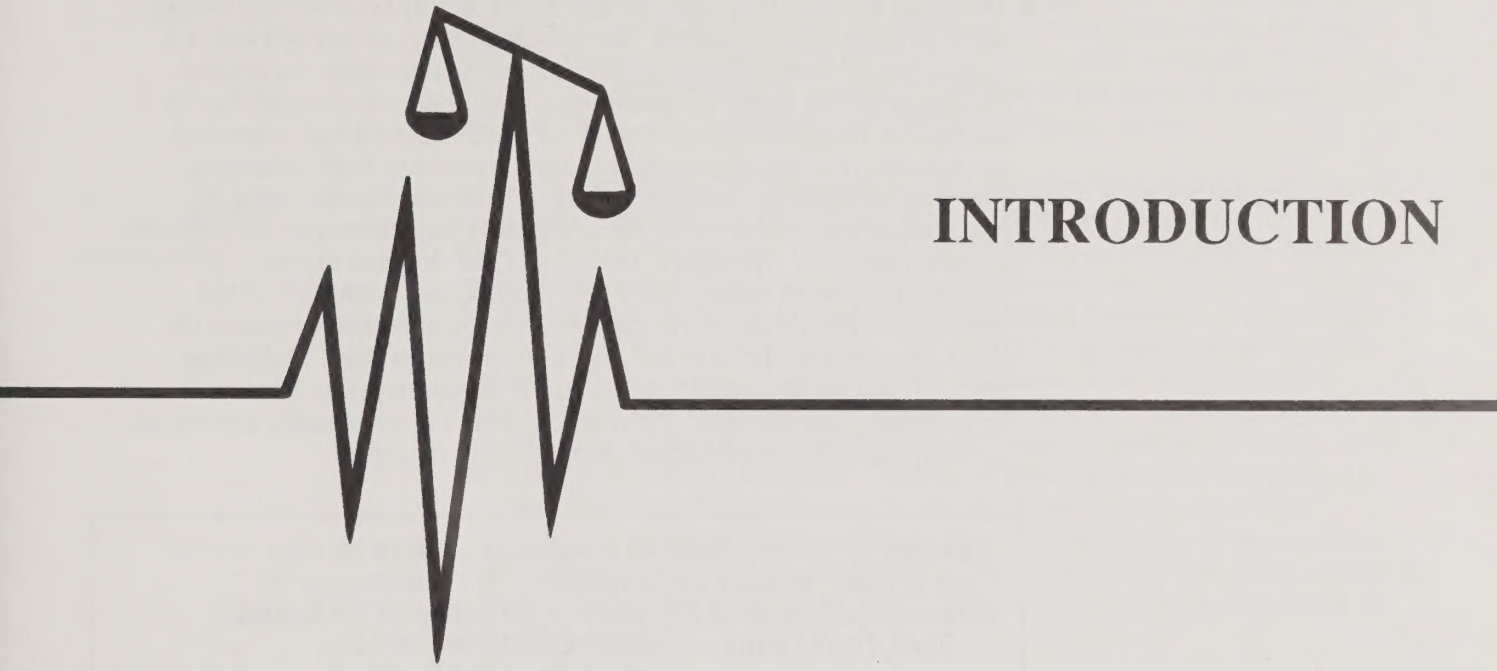


INTRODUCTION

What IS the potential liability of local governments for injuries and losses in an earthquake?

Local governments CAN be held liable for some losses.

The liability exposure of local governments varies with changing circumstances. Are local government facilities involved? Has the local government negligently issued a building permit for PRIVATE construction? Were procedures outlined in emergency plans and training classes followed?

Liability exposure also varies from state to state. The legal research on which this Guide is based focused on the four earthquake-prone states of California, Alaska, Utah and Washington.

Is liability acting as an incentive to earthquake hazard reduction programs?

Liability is one mechanism our society relies on to stimulate mitigation efforts for hazards such as earthquakes. Since the beginning of this century, liability has been viewed as a way to balance safety advantages with practical disadvantages. To determine the impact of liability on local government decisionmaking, the Association of Bay Area Governments (ABAG) conducted a written survey of local government employees in the four-state study area. In addition, lengthy in-person interviews were conducted in the northern California, Los Angeles, Puget Sound and Salt Lake City areas. The researchers concluded that concern for liability is just one of a number of factors motivating earthquake hazard reduction programs.

This Guide provides the findings and conclusions of a two-year research project funded by the National Science Foundation's Earthquake Hazard Reduction Program focusing on these issues.

LOCAL GOVERNMENTS CAN BE FOUND LIABLE -- SOMETIMES

- The legal defense that earthquakes are an ***act of God*** will no longer work in most circumstances. In the legal sense, an ***act of God*** is a natural event causing damage over which people have no control. Although in one sense an earthquake is beyond our control, the facts are that earthquakes occur in the four states studied and scientists are gaining increased knowledge about them and their processes. Earthquakes and the damage resulting from earthquakes may be foreseeable and under some circumstances the losses can be mitigated, at least partially. Therefore, the ***act of God*** defense to tort liability may work in only two very limited situations: (1) if the earthquake was of such type or size as to be unforeseeable and the local government did not act negligently with respect to dealing with a foreseeable earthquake; or (2) if the earthquake was foreseeable, and the local government took all ***reasonable*** actions to prevent harm, but nonetheless damage still occurred.

> ***The idea of foreseeability so dominates modern tort law the the "act of God" defense lacks viability. If disasters can be foreseen and planned for, there is the potential for liability.***
> **Prof. David Jung** -- Hasting College of the Law
> University of California

- The public has become more aware of local governments' role in natural disasters and expects them to fulfill that role responsibly.

- Cities and counties are inherently vulnerable because of the many services they provide. They adopt and enforce building codes, land use regulations and zoning ordinances; they prepare emergency plans; they build and maintain facilities of their own; and, they are responsible for keeping public areas --including parks, sidewalks and streets--free and clear of hazards.

- Partly because of their regulatory role, local governments traditionally have been protected by ***sovereign immunity***, a concept derived from the English legal system. It is based on the notions that (1) the "King can do no wrong," and (2) the lawmaker cannot be prosecuted under laws created by it. Although this immunity has been reduced in recent years, certain actions of local governments will continue to be immune from liability as courts balance the need of governments to govern against the need to compensate innocent victims of government negligence.

- Local governments may still be liable for the acts of their public officials and employees.

KEY LEGAL CONCEPTS

What is a tort?

The legal research examined tort liability. A tort is a civil (as opposed to criminal) wrong, other than a breach of contract, for which courts award damages. The ***liability*** which results from a tort is imposed on the entity which commits the tort (the local government in this research). Tort law is that body of knowledge, usually expressed in the form of statutory and judicial ***rules***, which determines when a tort has occurred.

Discretionary immunity

Local governments usually have several statutory immunities contained in their state's tort claims act. Many are based on the concept of ***discretionary immunity***. This immunity applies to basic policy decisions which have a planning, rather than an operational, character. For example, a city council's decision to enact a law requiring landowners to disclose geologic and soils conditions prior to selling the property or building on it would be immune as a discretionary function. The city manager's decision to waive the requirement may or may not be immune, depending on the language of the ordinance, the factors used to make the decision, and the state in which he is located. The clerk who issues a building permit without requiring the disclosure document is not immune under the discretionary function theory. The higher the level of the decisionmaker in the governmental chain of command, the more likely that this immunity applies. Thus, the "who" and "how" of a decision can be as important as the decision itself.

Statutory or mandatory duties

Failure of a local government to comply with ***statutory or mandatory duties*** imposed by the state or federal government may constitute the first element of a tort. These duties vary by state, and may include limited aspects of:

- enforcement of building codes and standards;
- inspecting, certifying and issuing permits for projects;
- implementing environmental review; and
- planning for emergencies and disasters.

Public duty doctrine

A pertinent duty may also be imposed on the local government under the ***public duty doctrine*** which applies when a "special relationship" exists between the local government and the victim. A government is immune if its alleged tort is based on a duty owed to everyone, but it may be liable if a duty was owed to the specific victim, or the victim was a member of a specific protected class of people.

Negligence standards

The concept of ***negligence*** is usually based on the rule of ***reasonableness***. How would a reasonable person have acted under similar circumstances? Could the injury or loss have been foreseen? What was the apparent magnitude of the risk? What were the relative costs and benefits of action vs. inaction?

Juries and judges

It is important to understand the role of ***judges and juries*** in a jury trial. Questions of fact (concerning whether something is factually true or untrue or whether something did or did not occur) are the exclusive province of the jury except under extreme circumstances. Questions of law (requiring that the law be interpreted or applied) are the exclusive province of the judge. However, it is the jury that decides, as a matter of fact, whether or not it would have been reasonable to do more, thereby determining, as a matter of law, that negligence exists.

PROMOTING SAFETY WHILE COPING WITH LIABILITY -- SOME ADVICE FOR LOCAL GOVERNMENTS

As a result of the findings from this study, the following are recommendations for local government to promote public safety and cope with liability.

1. Local governments should comply with any statutory or mandatory duties imposed by the state or federal governments.

2. A program should be developed to inspect, repair and maintain the city's or county's public buildings and facilities.

3. Your local government's risk manager is useful as an ally in promoting increased earthquake safety of all public facilities and buildings.

4. Local government staff should NOT assume that liability exposure exists for any mitigation program involving private property. Ask advice from your legal counsel.

5. Immunity from liability exists for almost any emergency situation. However, emergency staff should understand when the emergency is over and normal liability rules apply.

6. Act to promote the safety and welfare of the people in your community. If you act reasonably, your liability exposure can be minimized.

REPORT ORGANIZATION

Part I — Part I reviews current tort law for potential theories upon which the victims of earthquake-related harm or damages might base a lawsuit.

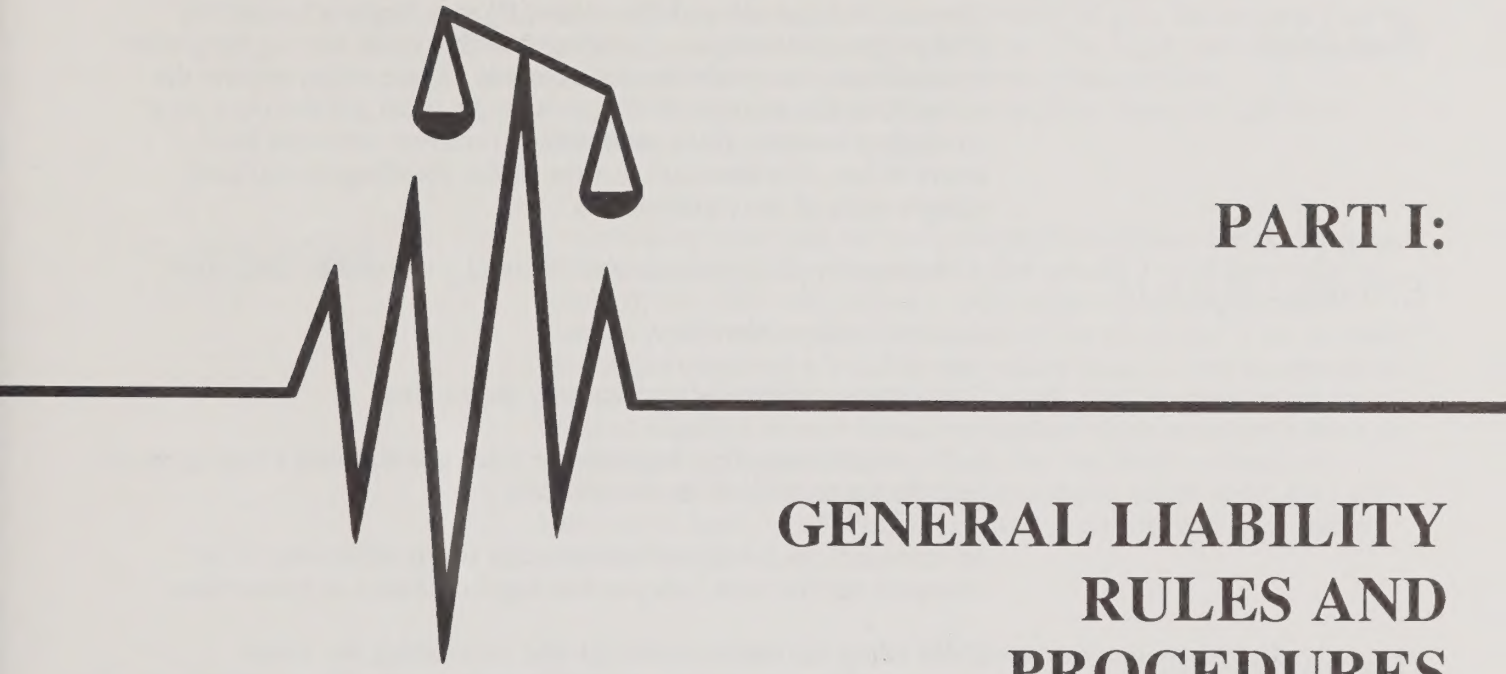
Part II — Part II summarizes the governmental immunities which prevent the imposition of liability regardless of whether or not the government's actions were negligent. The concepts reviewed include sovereign immunity, discretionary immunity, governmental/proprietary distinction, and public duty doctrine.

Part III — Because of the ***tension*** between the desire to compensate the victim of a governmental tort and the desire to allow government to function, the law may seem quite uncertain. The way the law operates is best viewed using a general discussion of the law for four general situations. This discussion is found in Part III.

Part IV — Part IV compares the theoretical and actual impact of tort liability rules on implementation of earthquake safety measure.

Part V — Part V sets forth several hypothetical situations. The tort law as described in Parts I, II, and III, as well as the behavior patterns discussed in Part IV, are applied to these situations.

Part VI — Finally, Part VI evaluates several approaches for increasing the effectiveness of tort liability in encouraging implementation of earthquake safety measures.



PART I:

GENERAL LIABILITY RULES AND PROCEDURES

Although each state differs as to the procedures for using the judicial system and the substantive tort law, the basic procedures are similar and help to explain some of the substantive tort rules. Comments in this report regarding procedures and substantive legal rules are accurate for the State of California and are generally applicable in other states. These rules were discussed in an ABAG report on The Liability of Private Businesses and Industries for Earthquake Hazards and Losses. Because of the different audiences for these reports, this section has been modified for inclusion in this document.

A. GENERAL RULES OF THE AMERICAN LEGAL SYSTEM

Pleadings

The victim of an alleged tort (plaintiff) may begin a lawsuit by filing appropriate papers (pleadings) with a court having the power (jurisdiction) to decide the issues raised. Some states require the plaintiff to file a notice of claims with the local government prior to filing a lawsuit. If the plaintiff is to recover damages in a court of law, it is essential that the initial pleading (complaint) alleges each of the elements of a tort.

Elements of a tort

1. A pertinent duty imposed on the local government (defendant)

2. A violation of that duty

3. Damages or injuries sustained by the victim

4. A causal connection between the local government's negligent act and the harm suffered by the plaintiff

In response, the local government may try to refute any of the elements and/or raise independent legal defenses or immunities.

Discovery/evidence

After filing the initial pleadings and concluding the initial procedural maneuvering, each of the parties usually starts the discovery process where each probes the other for the factual basis of its claim or defense. The myriad and complex rules governing the discovery process and the types of evidence which may be presented in a court of law are beyond the scope of this report.

Burden of proof

Legal rules impose the burden of proof on either the injured party or the local government in specific situations. The burden of proof is a two-part responsibility consisting of (1) the burden of producing the evidence to support a factual claim, and (2) the burden of persuading the judge or jury that the evidence presented is of sufficient credibility and weight.

The burden of producing the evidence necessary to sustain a factual claim usually falls on the party making that allegation. The evidence produced is evaluated under specific standards. The more common standard requires the responsible party to prove its point by a preponderance of the evidence. Note that the standard by which the evidence is evaluated is a question of law but the actual weighing of the evidence under the appropriate standard is a question of fact.

Questions of fact -- jury

Questions of fact concern whether something is factually true or untrue, or whether something did or did not occur. These are the exclusive province of the jury except under extreme circumstances. Moreover, a determination of a question of fact in one case has no effect on other cases, unless another case involves the same parties, facts and issues. For example, a jury finding that the City of Action could have added reinforcing structures to its building (1) is difficult to overturn on appeal and (2) has no weight in another trial where the question arises whether Dreamland County could have added the same reinforcement to the same building.

However, some questions of fact determine legal outcomes. For example, if the jury concludes that, as a matter of fact, a reasonable person in the City of Action's position would have installed the reinforcing structures (and the relevant legal standard is the reasonable person rule), then, as a matter of law, Dreamland County was negligent if it did not install them. The legal community refers to such questions as "mixed questions of fact and law." A determination of such mixed questions, like those of pure fact questions, is limited in its effect.

Questions of law -- judge

Determining questions of law is the exclusive province of the judge. If the judge's decision is appealed and upheld, it will generally be followed by other trial judges in other cases involving similar questions. For example, the question of whether, and if so, to what extent, the owner of a building has a duty to users and occupants to assure that the building is essentially safe, and the further question of what standard of care should be applied to an architect's work in designing a high-rise building along the San Andreas fault are questions of law. Once legal rules have been established, they will continue to apply in all similar cases until overturned by a higher court or by statute.

Causation

The injured party must prove that there is ***cause in fact***, that is, that there is a causal relationship between the act of the local government and the harm suffered. In general, this is a question of fact for a jury to determine. The jury's analysis of whether this has been proved is guided by a rule of law which generally asks whether "but for" the local government's negligent action, the plaintiff's injury would have occurred. In instances where the defendant's or tortfeasor's action consists of a failure to act or to take reasonable precautions (whether or not it is labeled an affirmative duty), the guiding rule would be, "if the local government had taken a non-negligent course of action, would the harm have been prevented?" Under these circumstances, the analysis is usually complex and highly uncertain.

In instances where more than one defendant or tortfeasor cause the plaintiff's injury, all may be liable. The allocation of liability among them depends on the state and the circumstances.

While generally the issue of causation is one of fact for the jury, there are situations in which the court will rule that as a matter of law there is not sufficient causal connection between the local government's acts and the harm suffered to support liability. In those instances, the court determines that the conduct of the local government was, as a matter of law, not the ***proximate cause*** of the harm incurred. The rules governing whether there is proximate cause between the act complained of and the harm suffered are complex and beyond the scope of this report.

Legal defenses

Statutes of limitation provide that legal action on a claim must commence within a certain time period. Such limitations are designed to prevent the prosecution of claims that have remained unasserted while evidence has been lost, memories abated and witnesses disappeared. Even if the claim is just, it is unjust not to put an adversary on notice to defend within the period of limitations. The right to be free of stale claims eventually prevails over the right to prosecute a claim.

In general, the precise period of time applicable to a given action is established by statute. The statute of limitations "begins to run" (i.e., commencement date for determining the period of time) when a legal remedy is available. In tort cases, this usually occurs when the plaintiff discovers, or should have discovered, the harm or injury complained of. Under certain circumstances the statute of limitations may be tolled. For example, if the statute of limitations is for a five-year period, and the defendant is absent from the State of California for one year, the plaintiff has a total of six years in which to bring the suit. An enumeration of the various circumstances under which a statute of limitations may be tolled is beyond the scope of this report.

Many local governments insert form provisions in their contracts in which: (1) the government asserts that it has no tort liability under specified, or all, circumstances (disclaimers); or (2) the other party to the contract agrees that it will reimburse the local government for any claim against that government arising out of the contract (hold harmless clauses). Under California law, ***disclaimers of liability*** for negligence are invalid if they "affect the public interest." It is clear that if the following five factors are present then such a disclaimer is ineffective:

- the service provided is of great importance to the public or a practical necessity for some members of the public;
- the defendant holds itself out as willing to provide this service to the general public;
- unequal bargaining power exists between the defendant and the victim;
- the disclaimer is included in a standard form contract lacking any arrangement whereby the disclaimer can be deleted; and
- the relationship between the defendant and the victim places the victim basically under the defendant's control.

To date, it is clear that California law will invalidate a tort negligence disclaimer even though not all five of the factors are present. However, it is unclear what combinations of less than five are needed to invalidate such disclaimers.

If the plaintiff is also negligent and such negligence is a contributing cause of injury, then such ***contributory negligence*** may be a defense in an action based upon negligence of another. If contributory negligence is proven, it may preclude or reduce the plaintiff's recovery.

The modern trend is away from using contributory negligence as to totally preclude recovery and toward a ***comparative negligence*** standard. Under the latter system, a jury is asked to assign relative fault for the injury between the plaintiff and the defendant. In some states, damages are apportioned between the plaintiff and the defendant up to the point where the plaintiff's negligence is equal to or greater than that of the defendant. After that point, the plaintiff is precluded from any recovery. In a small number of states, including California, damages are apportioned in direct relationship to fault.

On June 4, 1986, the California voters approved State ***Proposition 51*** which limits the liability of certain defendants. In part, the ballot measure added Section 1431.2 to the California Civil Code which provides as follows:

> "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.
>
> (b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.
>
> (2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

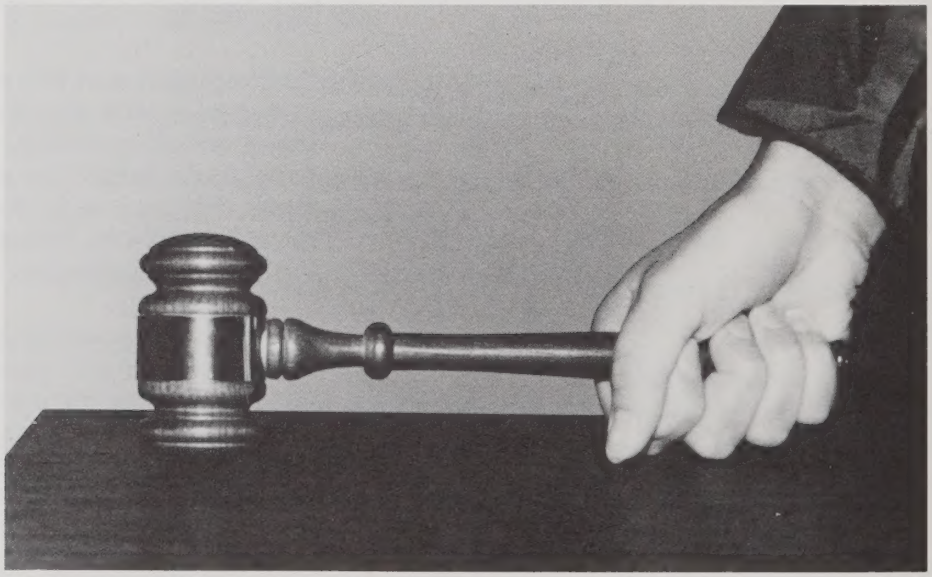
Prior to the passage of Proposition 51, a plaintiff in the State of California could recover all damages from any one of the defendants found liable under the theory of joint and several liability. For example, under California's comparative fault principles, the jury could find that in a three car collision, the plaintiff was at fault

30%, defendant A 20% and defendant B 50%. Under the traditional joint and several liability doctrine, the plaintiff could recover 70% of all damages from either A or B.

Proposition 51 replaced the traditional joint and several liability doctrine with a system that permits the plaintiff to recover all of its economic damages (excepting only that portion attributable to the plaintiff's negligence) from either defendant A or B. However, the plaintiff can only recover a portion of its "non-economic damages" from each defendant, the portion which is equal to the defendant's percentage of fault. In the above example, the plaintiff can still recover 70% of its "economic damages" from either A or B. However, it can only recover 20% of its "non-economic damages" from A and 50% of such damages from B.

The system introduced under Proposition 51 is still being refined with respect to its application to complex multi-party litigation and settlements, and with respect to the definition of "economic damages" and "non-economic damages."

The major legal defenses for local governments are, however, the governmental immunities which grew out of the concept of sovereign immunity. These immunities are discussed in Part II.



B. NEGLIGENCE STANDARDS

Whether negligence is determined before or after the court decides on the application of governmental immunities varies by state and court. However, in this Guide, negligence is described first and the application of various immunities is described in Part II.

The negligence standard is a rule of law defining the standard by which a person's actions will be evaluated to determine whether a person has violated a duty to the victim and whether the person should be liable.

Reasonable person

Negligence consists of conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." The standard by which conduct is measured has traditionally been the hypothetical behavior of the archetypal reasonable person. It remains an essentially intuitive or common-sense standard.

> ***The "reasonable person" is the one judging your conduct from the jury box. Try to anticipate what he/she would have done and act accordingly.***
> **Edwin Rooker** -- Claims Council, Design Professionals Insurance Company

Balancing variables

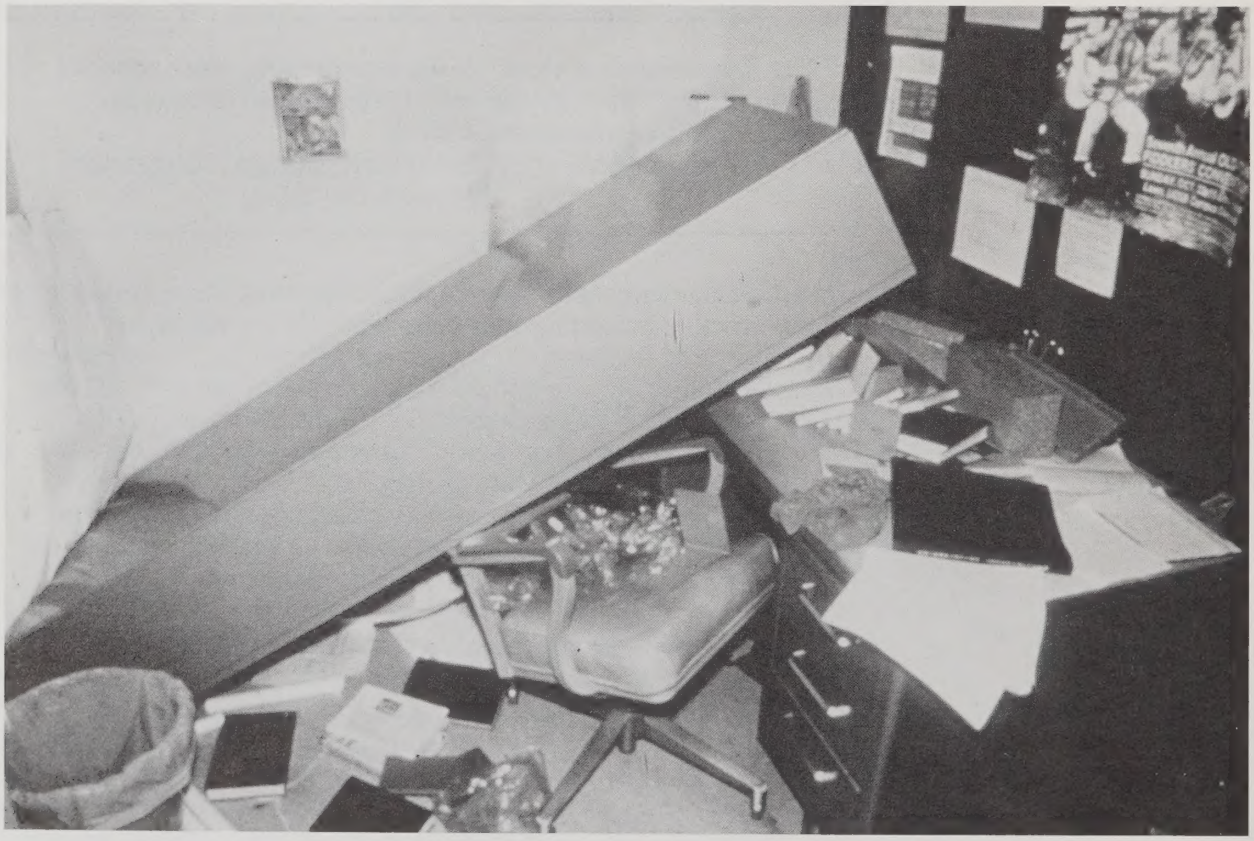
Nonetheless, attempts to analyze the behavior of the reasonable person usually involve balancing four variables: (1) the apparent probability that the harm-causing event will occur; (2) whether the person actually knew, or should have known, of the risk; (3) the magnitude of the resulting harm; and (4) the effort required to implement adequate precautions. An underlying factor critical to this analytical process is the value society, or the judicial system, assigns to the potential harm and the effort necessary to avert it. In many respects, a cost-benefit analysis is a specific response to the question of how to value the benefits and harms.

Possible responses to the question of valuing benefits and harms are statutes or regulations which establish minimum standards of care for specific situations. For example, a city's building code could require some earthquake hazard mitigation measures. If a building is constructed in violation of that code section and injuries result during an earthquake, the plaintiff only needs to prove that the code was violated to prove ***negligence per se***. In this instance, society (through the city council) has decided that the value of the extra safety of a properly constructed building is more than the cost of fully complying with the violated code conditions. It should be noted that this legal rule is only applicable if the harm suffered is the same type of harm which the statute or regulation was intended to prevent.

Producing evidence

In a court case where the reasonable person standard is applied, the victim (plaintiff) would have the burden of producing evidence and persuading a jury by that evidence that:

- the tortfeasor (defendant) acted in a certain way;
- a reasonable person would have anticipated the possibility of the harm occurring;
- there were alternatives available to the defendant which would have averted the harm; and
- a reasonable person would have averted the harm.



C. STRICT LIABILITY RULES

For the purposes of this report, strict tort liability may be defined as the legal rules which impose tort liability without analyzing the quality of the alleged local government's behavior. The local government will be liable if (1) there is merely the existence of a specific relationship between the local government and the victim, or (2) the relationship exists and there is indirect or circumstantial proof that the local government's conduct is negligent.

Ultrahazardous activity

Certain activities are viewed under tort law as being ultrahazardous or abnormally dangerous. In the event that harm or damage is caused by such activities, tort liability is automatically imposed. The plaintiff merely needs to prove that the activity (1) falls within the legal category of ultrahazardous or abnormally dangerous and (2) caused the harm for which the plaintiff seeks recovery.

A note of caution: all examples of the application of this concept in the four states studied apply to private sector, not local government, activities. It is unclear whether this concept will be applied to local governments in the future.

Employers' vicarious liability

An employer is generally liable for torts committed by its employees within the scope of their employment under the concept of vicarious liability. The plaintiff must prove that the employee(s) acted negligently and that the activities were performed within the scope of the employee's employment. Once these two factors have been proven by a preponderance of the evidence, the employer is automatically liable for the damages resulting from that activity.

In practice, the vicarious liability rule does not expand an employer's liability as much as it may seem on first impression. In some instances, the employer would be liable even without the vicarious liability rule. For example, the employer's own negligence in selecting, training or supervising the employee may have contributed to the damages. In such cases, general negligence law principles would hold the employer liable and the vicarious liability rule only acts to remove the burden of proving the employer's negligence from the plaintiff.

On the other hand, the rule makes an employer liable in cases where the employer was not itself negligent but the employee was. To that extent, the vicarious liability rule is an expansion of an employer's liability beyond the scope of general negligence law.

Workers' compensation

For the most part, the statutory scheme of workers' compensation makes an employer strictly liable for all injuries to employees, if the injuries occur "in the course of" and "arise out of" the employment. The plaintiff is not required to present evidence of any negligence, defect or ultrahazardous activity of any sort. Only extreme forms of employee misbehavior, such as voluntary intoxication or instigation of on-the-job fighting, are defenses to liability. The employee's own carelessness in causing the injury does not affect either the employee's ability to recover or the size of the damages. However, the statute itself restricts the amount of damages which the employee may recover. The employee may recover all direct medical expenses and a portion of lost wages computed according to a statutory formula and a statutory amount for wrongful death. Under certain circumstances an employee may recover for intangible detriments, for example, pain and suffering.

Inverse condemnation

For purposes of this discussion, inverse condemnation derives from the constitutional requirement that a local government cannot "take" private property without "just compensation." Where government ACTION results in such damage to property that it is useless or greatly diminished in value, a court may rule that the action is a "taking" that must be compensated. Although inverse condemnation is not a traditional form of strict liability, the manner in which the rules are applied is similar to strict liability because the local government is liable if such a taking has occurred, regardless of its negligence.

One court in **California** (Rose v. Coalinga) confirmed an individual's right to bring suit in inverse condemnation for a public entity's demolition of a private building damaged after the Coalinga earthquake. That court acknowledged that public agencies have the power to damage or destroy property without paying compensation in emergency situations. However, whether or not **Utah** recognizes an action for inverse condemnation is not clear. Several inverse condemnation suits based on local governments' handling of the 1983 rains and resulting flood and mudslide damages were on appeal before the Utah Supreme Court in 1988.

> ***Our City Attorney* "QUAKES" *at the mention of inverse condemnation related to demolition.***
> Anonymous local government official

D. STATUTORY AND REGULATORY STANDARDS

In many instances, a standard of conduct is established by statute, ordinance or regulation. In all cases, such standards of behavior are considered to be minimum standards. Failure to meet the statutory or regulatory requirements constitutes ***negligence per se*** and requires a finding of liability if the harm that results from the conduct which fails to meet such standards is the type of harm which the statute or regulation is intended to prevent.

However, compliance with the statute or regulation does not preclude a finding of negligence if, under the circumstances, a reasonable person would have taken additional precautions. Compliance with such a standard is only one part of a body of evidence considered by the jury. Despite the defendant's compliance with statutory or regulatory standards, when there are special circumstances in the case at hand which distinguish it from the general circumstances addressed by the statute or regulation, providing the defendant's negligence is easier. Further, although most statutes or regulations are minimum standards, there may be specific statutes or regulations which set standards otherwise applicable under judicial tort law. Compliance with such standards would be very strong evidence of non-negligence.

E. AFFIRMATIVE DUTIES

Ordinarily, under tort law, a person who fails to act to prevent harm or rescue personal property from damage is not liable for the harm or damage. A widely accepted exception to this general rule is "if the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he (or she) is under a duty to exercise reasonable care to prevent the risk from taking effect" (affirmative duty). Also, if the court finds that there is a special relationship between two individuals, the court will also recognize that one of them has an affirmative duty to the other, and sometimes, even to third parties. The parent-child and doctor-patient relationships are prime examples of such special relationships. Finally, in California, recent decisions lead one to believe that the general rule of no affirmative duty is morally questionable and therefore subject to an expanding list of exceptions and qualifications.

Some statutes or regulations require individuals to take certain actions or behave in a certain manner. These may be viewed as affirmative duties although they are theoretically a mere codification of what a "reasonable person would do."

F. DAMAGE ISSUES

Bodily injury/death

Except in cases of behavior which would warrant the imposition of punitive damages (see "Punitive Damages"), the type and extent of injury or harm suffered by the plaintiff determines the size of the recovery permitted by the judicial system. One of the most difficult tasks in the tort liability analysis is determining the size of the recovery for bodily injury or death to the victim.

Some aspects of the damages are easily measurable, e.g., direct medical costs, some types of prospective medical costs, and lost wages over a short period of time. However, other impacts of the injury/death may be difficult to measure economically. A classic example is valuing the death or permanent disability of an individual. It might reasonably be argued that the value of a human life or appropriate compensation for a person rendered a quadriplegic is astronomical. However, the tort liability system operates on the assumption that damages are both finite and measurable. Therefore, some recovery will always be permitted for such types of harm.

Property damage

It is now well established under tort liability rules that a tortfeasor is liable for damage to the property of others. Classically, the legal system measures such damages in terms of an amount which would "make the victim whole." The method of determining compensation for property damage varies widely. For example, a cornice falls from a city hall during an earthquake and shatters the windshield of a car. The local government may be liable for the cost of replacing the windshield. In some circumstances, the victim may have been made a bit "more than whole" by receiving a windshield in better condition than the one which had been broken. Such imprecision is tolerated on the theory that but for the defendant's negligence, there would be no need to replace the windshield.

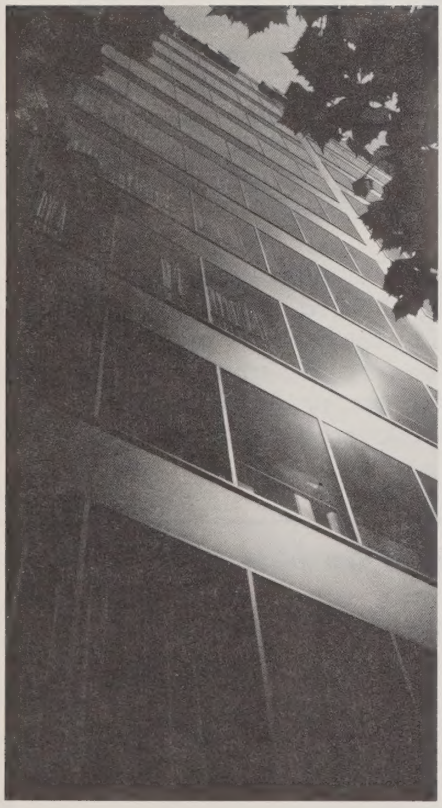
In the more complex case, the damage is to unique property, the value of which is difficult to determine. For instance, assume that a commercial apple orchard is contaminated with chemicals which leaked from a city's sewage treatment plant as a result of an earthquake. Are the damages owed to the owner of the apple orchard the current market value of the orchard, the income the orchard owner would have earned over the next 5, 10, 15 or 20 years, or the cost of purchasing a comparable replacement apple orchard? The choice among such remedies is usually made on a case-by-case basis.

Emotional distress

A plaintiff's ability to recover monetary damages for the emotional distress which results from a defendant's negligence has been changing significantly over the past few decades. In the earlier private liability research, the fairly complex evolution of the widening basis for recovery of emotional distress damages was researched for California. This work was not expanded in this research project. It should be noted, however, that California has the most extensive rules on recovery in the country.

The California rules can best be illustrated by way of the following example. Assume that a married couple, both of whom are professionals employed in the high-rise section of a major city, are walking on the sidewalk near their offices when a strong to moderate earthquake occurs. As a result of the earthquake, panes of glass are dislodged from a high-rise office building owned by the local government. One of the panes of glass strikes the husband, causing several deep gashes and lacerations over his entire body and head.

First, assume that the husband's injuries cause intense pain and suffering during the recuperation period and some residual pain for the remainder of his life, but heal without any permanent scarring. Under such circumstances, almost all American courts will permit the husband to recover monetary damages for the physical pain and suffering both during the recuperation period and thereafter.



Second, assume that all of the factors in the basic situation and the first example are true except that the husband now has severe facial scarring. The husband is embarrassed and severely distressed by the scars. In most American jurisdictions, he would be able to recover monetary damages for such embarrassment and distress.

Third, assume that the basic situation has occurred, except that the pane of glass crashes to the ground at the husband's feet and he is struck, but not cut, by flying shards. As a result of the accident, the husband now has a severe phobia about walking in the shadow of high-rise office buildings. The phobia further causes physical effects, such as a nervous tic and a stammer, so long as he is in the street in the presence of a high-rise building. The plaintiff will generally be able to recover monetary damages for the emotional distress of the phobia, as evidenced by the physical manifestations and which were caused by the impact of the pane of glass against his body.

Fourth, assume the same situation as above, except that this time there is a complete miss and no piece of glass ever strikes the plaintiff. American courts are divided as to whether the plaintiff can recover monetary damages for the phobia which manifests itself in the nervous tic and stammering when there is no physical contact between the negligent instrumentality (the piece of glass) and the plaintiff.

Fifth, assume the basic situation, except that now the wife is suing. She suffered a nervous breakdown and is unable to walk in the shadow of a high-rise office building without exhibiting nervous symptoms such as a tic or stammer. A limited number of jurisdictions, including California, will permit the recovery of monetary damages for the emotional distress evidenced by these physical symptoms when the plaintiff merely suffers as a result of observing the physical injury to a close relative. Further, in California, recent caselaw indicates that even without a physical manifestation of the emotional distress, the wife may be able to recover monetary damages.

Economic harm

In general, purely economic losses, such as lost earnings or profit, are not recoverable in a tort lawsuit unless they arise out of personal injury or property damage. However, in California, Alaska and Washington, purely economic losses are recoverable as part of general damages in a suit for personal injury based on negligence. Routine or usual profits lost during the time necessary to repair or replace the property are also recoverable.

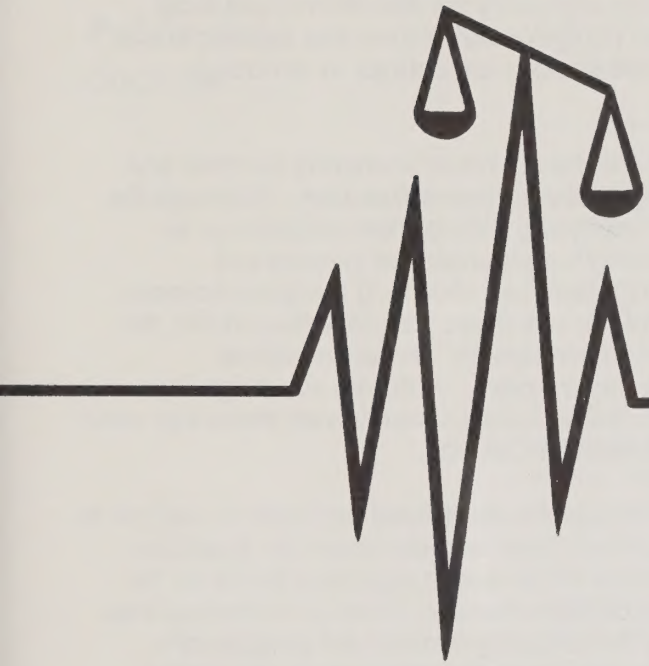
Punitive damages

Tort law makes a distinction between inadvertently and deliberately risky conduct. If the negligent conduct is inadvertent, the plaintiff may recover the type of damages described above. Such damages are compensatory, inasmuch as they are theoretically designed to compensate the plaintiff for his/her injuries.

However, if the defendant's behavior can be labeled as deliberate or reckless, not only can the jury require the defendant to compensate the victim, it can also require that the defendant pay punitive damages. Such damages are theoretically designed to both punish and deter the defendant, and others similarly situated, from engaging in the same type of reckless behavior. Whether behavior can be termed reckless depends, in part, on the extent to which the defendant deliberates over the allegedly torious act or omission.

In California, the defendant must be "guilty of oppression, fraud or malice" before punitive damages may be imposed. Moreover, an employer is not liable for punitive damages based on the behavior of an employee unless (1) the employer was aware of the employee's unfitness and acted with a conscious disregard of others, or (2) the employer ratified the employees acts, or (3) the employer was also guilty of oppression, fraud or malice.

> ***To effectively manage risk, you have to first admit that it's there.***
> **Alan Goldfarb** -- Councilmember, City of Berkeley, Calif.



PART II:

LOCAL GOVERNMENT TORT LIABILITY

Sovereign immunity

The American tort system recognizes certain governmental immunities which prevent the imposition of liability regardless of whether or not the government's actions were negligent. This system grew out of the concept of ***sovereign immunity*** from the English common law. Although it was first applied to the federal and state governments, it was then extended to cover certain activities of municipal governments.

Sovereign immunity is based on the notions that (1) the "King can do no wrong" and (2) the lawmaker cannot be prosecuted under laws created by it. Although such thinking may seem foreign to modern America, the doctrine of sovereign immunity, when applied to the federal and state governments, can be supported by other considerations. First, the doctrine, by sometimes constraining and sometimes permitting judicial review of government activities, acts to define the boundaries of activities essential to each branch of government. Second, the doctrine reflects the judiciary's recognition of its own limitations.

The application of sovereign immunity to municipal, or local, governments is complicated by two factors. First, it may be argued that municipalities do not have "sovereign" status under a republican form of government. Therefore, any sovereign immunity accorded local government is derived from, and subject to legislative control by, the state government. Second, municipalities have historically performed both traditional "governmental" functions and nontraditional "proprietary" functions which were, or are, also performed by private entities. One can argue that sovereign immunity only applies to traditional governmental functions and not to "proprietary" functions.

The doctrine of sovereign immunity evolved from an absolute bar to all tort liability into systems of immunities, privileges and liabilities which differ among the federal, state and local governments. By the mid-1970s, most states had, by either legislative or judicial means, abolished absolute sovereign immunity for themselves and local governments. States either (1) make themselves and municipalities generally liable, or (2) create specific exceptions to sovereign immunity.

Discretionary function

In either case, most states effectively retain immunity for their and a municipality's exercise of a ***discretionary function***. Although the scope of the discretionary immunity differs from jurisdiction to jurisdiction, its premise lies in the separation of powers and judicial restraint arguments articulated above. If the governmental activity falls within the areas to which the judiciary must defer, the activity is characterized as "discretionary" to that branch of government, and consequently immune. Absolute sovereign immunity has essentially been converted into a limited discretionary immunity more in keeping with modern American thinking.

Various state courts have developed short-hand methods of analysis to distinguish between discretionary and non-discretionary functions. All jurisdictions have rejected the semantic argument based on the literal, dictionary meaning of discretionary. Some jurisdictions base the distinction on whether the allegedly tortious act consists of a planning decision, or is one which merely implements a planning decision.

The planning/operational distinction can be illustrated with the following example. A city council's decision to enact a law requiring landowners to disclose geologic and soils conditions prior to selling the property or building on it would be immune as a discretionary function. The city manager's decision to waive the requirement may or may not be immune, depending on the language of the ordinance, the factors used to make the decision, and the state in which he is located. The clerk who issues a building permit without requiring the disclosure document is not immune under the discretionary function theory. The higher the level of the decisionmaker in the governmental chain of command, the more likely that this immunity applies. Thus, the "who" and "how" of a decision can be as important as the decision itself.

Governmental/ proprietary distinction

Some state tort systems also retain the ***governmental/proprietary function distinction*** as a means of determining whether specific municipal activities are immune from tort claims. This doctrine divides municipal activities into two groups. One group consists of traditional or fundamental functions (such as police and fire protection) to which sovereign immunity applies. The other group consists of functions not typical of, or fundamental to, government (such as operating a liquor store) to which sovereign immunity does not apply.

Historically, this distinction has been difficult to apply with consistency. In part, the inconsistency results from the incongruity between two categories and the underlying policy of

governmental tort immunity. In part, it is caused by the changing roles of the public and private sectors which blur or change the boundaries between the proprietary (private) and the governmental (public) functions.

Public duty doctrine

A third test for determining whether a municipality is immune is called the ***public duty doctrine***.

> ***The Public Duty Doctrine -- A government is immune if its alleged tort is based on a duty owed to everyone, but it may be liable if a duty was owed to the specific victim, or the victim was a member of a specific protected class of people.***
> **Crane Miller** -- Attorney-at-Law, Washington, DC

In general, to determine whether a tort has been committed, a formal analysis requires that (1) the entity doing the harm (tortfeasor) owe a "duty" to the victim, (2) the tortfeasor violate the duty, (3) the violation harm the victim, and (4) in violating the duty, the tortfeasor's behavior fall below acceptable norms. The first requirement is addressed and determined by the public duty rule. Simply stated, if the alleged governmental tort is based on a duty which the government owes to everyone, then the first requirement is not met. The public duty doctrine requires that the injured party show a duty owed to that party in particular, or to a circumscribed class of persons, of which the injured party is a member. If the duty exists, courts often characterize it as a "special relationship" between the injured party and the governmental entity.

State variations

The handling of all the immunities described above, particularly the public duty doctrine, in the various state courts reflects the tension between the policies underlying governmental immunity (allowing government to govern effectively) and of compensating the innocent victims of governmental negligence or wrongdoing.

The application of these concepts to the four states studies reveals a variety of approaches.

Alaska

Alaska abolishes sovereign immunity but provides specific immunities, including the discretionary function immunity, by statute. Generally, the state adheres to the planning/operational test in determining whether the discretionary function immunity is available.

California

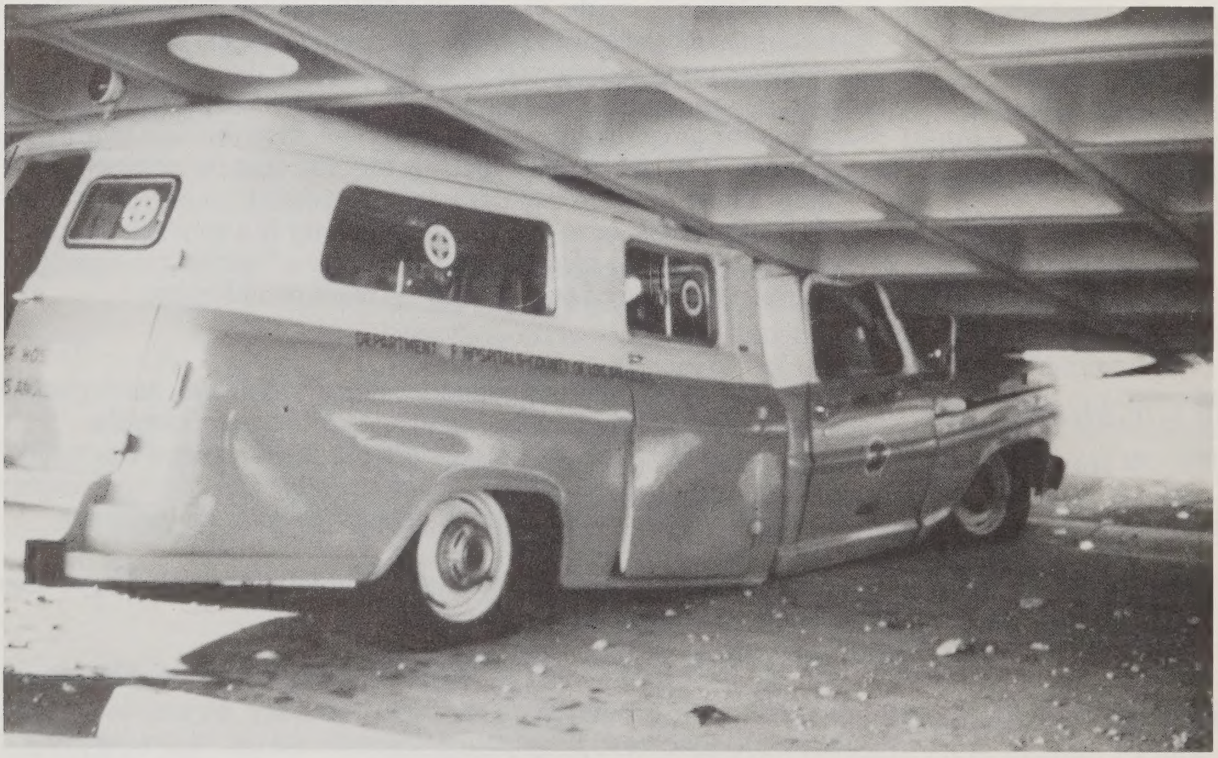
California retains sovereign immunity but establishes specific liabilities by statute, including liability for the negligence of public employees. However, the statute also provides a discretionary function immunity for employee negligence. California uses the planning/operational test for the discretionary function immunity with particular reliance on the status of the decisionmaker. California courts have also employed the public duty doctrine both in its traditional form and as a "mandatory duty rule" to create non-statutory liability.

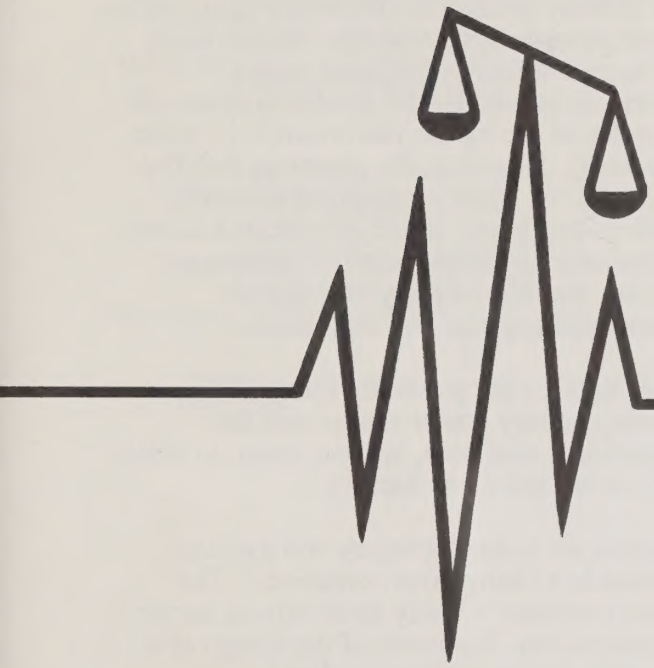
Utah

Utah retains sovereign immunity subject to statutory liabilities. Uncertainty over the scope of the immunity which focused on whether an act was, or was not, "governmental" has been settled by recent legislation. The statutory liability for the negligence of public employees is ameliorated by the discretionary function immunity which is defined by the planning/operational test.

Washington

Washington abolishes sovereign immunity without statutory exception. The courts have established a discretionary function immunity and have applied the public duty doctrine to determine whether any tort was committed in the first instance. The courts permit recovery of purely economic damages in tort.





PART III:

VARIATIONS IN CIRCUMSTANCES

Because of the large variation in potential immunities available to local governments in each of the four states studied, the potential for liability is best evaluated in terms of four general situations in which local governments might find themselves. The concepts discussed in this section are further refined when they are applied to the five hypothetical situations discussed in Part V.

The extent of liability which local government staff believe exists depends on the circumstances and the state. However, the local attorneys consistently believe that government has less liability exposure than the other staff members.

A. LIABILITY FOR PUBLIC PROPERTY

The most likely sources of liability are injuries or damages caused by the "dangerous condition" of government property -- its hospitals, city halls, jails, and public works. Historically, land owner liability for injuries and damages caused by the condition of its property depended on the status of the victim (for example, a guest, licensee, permittee or trespasser). However, the ***premises liability doctrine*** is being gradually replaced by the negligence standard. Under this standard, the risk of being held liable is increased if the government had actual or constructive knowledge of "dangerous" conditions. In most situations, the injured party will rely on traditional tort analysis in establishing liability.

Alaska

In Alaska, local government liability for public facilities is equivalent to that of a private property owner except that the discretionary function immunity is available, in most cases, to shield the initial decision to build, or not build, the facility.

California

California's local governments are liable for injury and damage resulting from public facilities in a "dangerous condition." The cases defining a "dangerous condition" closely track private sector tort liability in similar circumstances. However, if the design of a public facility is the cause of the injury or damage, local governments may be immune if (1) the original design decision was by a policy making body after a considered weighing of the potential problems, and (2) any "changed conditions" are given due consideration and a reasonable action is taken, or reasonably deferred.

Utah

In Utah, local governments are liable for injury and damage caused by public facilities. Immunity retained for "latent defects" appears to be no more than a restatement of general tort principles.

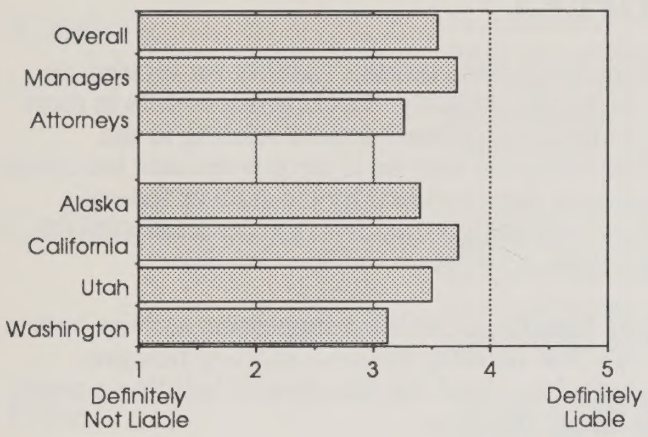
Washington

Washington's local governments are liable for injuries and damage negligently caused by public facilities. The possible use of the discretionary immunity for certain decisions regarding public facilities (such as decisions to build and siting) is undeveloped at this time.

Inverse condemnation

Because of the extensive immunities in California and Utah law, the theory of ***inverse condemnation*** may be used when public property or public actions are involved in damaging private property. One court in **California** (Coalinga v. Rose) confirmed an individual's right to bring suit in inverse condemnation for a public entity's demolition of a private building damaged after the Coalinga earthquake. That court acknowledged that public agencies have the power to damage or destroy property without paying compensation in emergency situations. Whether **Utah** recognizes an action for inverse condemnation is not clear. Several inverse condemnation suits based on local governments' handling of the 1983 rains and resulting flood and mudslide damages were on appeal before the Utah Supreme Court in 1988.

How is liability perceived?



Those surveyed were asked, based on their knowledge of current law and recent court decisions, to what extent they thought that local governments in their state could be held liable for a failure to reduce known earthquake hazards on public property.

Most of the managers clearly believed that the local government probably would be liable, while the attorneys were not nearly as certain of liability.

Those from California were most likely to think that the jurisdiction might be held liable, followed by Utah, Alaska and Washington.

We have a fire station which is a wood building about 70 years old. The termites are holding hands to keep it up.
Anonymous local government official

B. LIABILITY FOR PERMITS AND INSPECTIONS OF PRIVATE PROPERTY

Local governments have much less potential liability for injuries on private property than on public property. Local governments in most states are immune from liability for most actions relating to the issuing of permits. One exception may be if the government has failed to comply with a mandatory duty imposed by the state or federal government. Local governments have an even greater immunity for actions relating to inspection activities.

Alaska

Alaska immunizes from liability all building inspection activity both by statute and under case law defining the discretionary function immunity. Alaskan courts have held that issuance of building permits is immune as a discretionary function.

California

California immunizes all inspection and permitting activities by statute. A narrow exception for the failure of local government to comply with a mandatory duty during the permitting process had been created by the courts and was subsequently narrowed by legislative action.

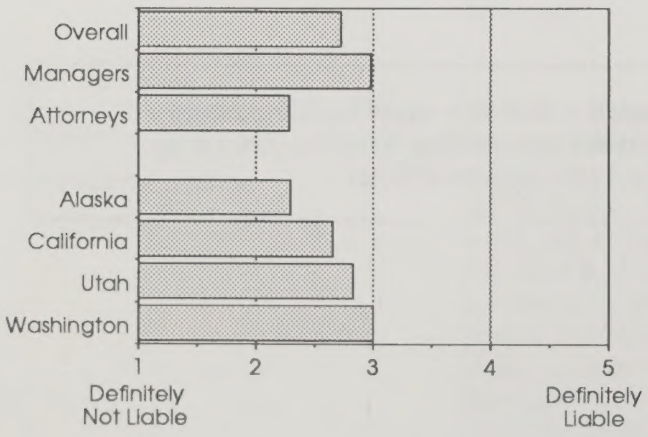
Utah

Utah clearly immunizes all but a very narrow range of building inspection and permitting activities. The theoretical basis for liability resulting from negligent inspections and permit issuance has not been confirmed by court decisions.

Washington

Washington courts, on the other hand, have consistently found liability for building inspection and permitting activities so long as the injured party can establish a "special relationship" under Washington's ***public duty doctrine***.

How is liability perceived?



Those surveyed were asked, based on their knowledge of current law and recent court decisions, to what extent they thought that local governments in their state could be held liable for a failure to reduce known earthquake hazards on private property.

This situation was thought to have less liability exposure than the one relating to public property. While the managers felt that liability might or might not exist, depending on the situation, the attorneys believed that liability probably would not exist. The differences in the responses of the managers and attorneys was larger than in the public property situation, perhaps because the attorneys were more aware of available immunities.

Those from Washington were most likely to think that the jurisdiction might be held liable, followed by Utah, California, and Alaska.

C. LIABILITY FOR EARTHQUAKE RESPONSE AND SERVICES

Alaska

In Alaska, any emergency response action taken pursuant to a request by or an agreement with the state is immune. Any other emergency response action would be immune from liability only under the discretionary function immunity. Although the emergency response plan itself would probably be immune, its field implementation might not be.

California

A California statute provides immunity for both discretionary and operational decisions made in emergency situations. In the highly unusual circumstances where the statutory immunity is not available, the injured party would probably not be able to establish a legal duty upon which to base a tort claim.

Utah

The Utah statute also provides immunity for public entities and their employees in most emergency response situations. In the unusual circumstances where the statutory immunity is not available, the public entity may be liable for the non-discretionary acts of its employees.

Washington

In Washington, the discretionary immunity is the only defense for local governments against liability for negligence in their earthquake response and services. Emergency response field decisions are probably not immune. Therefore, the question of whether the public entity owes a duty to the injured party is pivotal. However, this is difficult to analyze without knowing the specific circumstances of the situation.

No question in the survey relates specifically to this situation.

D. LIABILITY FOR EARTHQUAKE PREDICTIONS AND WARNINGS

Alaska

Alaska immunizes local governments for emergency response activities undertaken pursuant to a request or agreement with the state. Absent such an agreement, the local government may be able to assert the discretionary immunity if it can prove that its decision on whether to issue an earthquake warning is based on planning, policy and political criteria.

California

Local governments in California operate under a system substantially similar to Alaska's. The major difference is the existence of a statute which explicitly immunizes the state and local governments issuing earthquake warnings under the authority of the state. Discretionary function immunity probably also is available for earthquake warning/response activities not conducted under state authority.

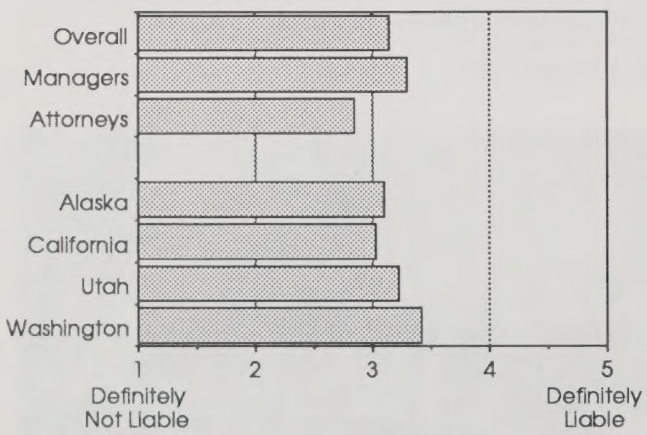
Utah

In Utah, the issuance of an earthquake warning is probably immune either under the provisions of state statutes or the discretionary immunity function.

Washington

In Washington, there is no statute granting immunity for the issuance of a warning. The discretionary function immunity is the only defense to liability.

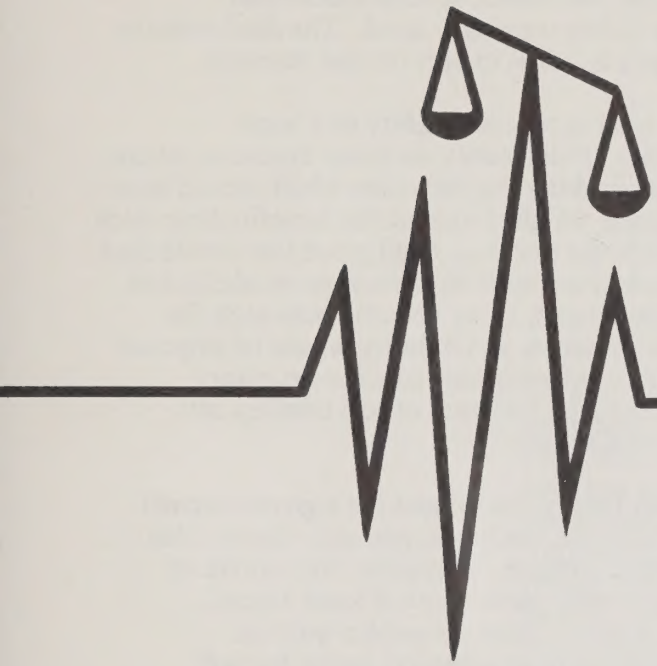
How is liability perceived?



Overall, this situation was thought to be less likely to result in liability than the situation relating to liability for public property and more likely to result in liability than the situation relating to liability for private property.

The managers leaned toward believing that liability might exist, while the attorneys believed that liability might or might not exist.

Those from Washington were most likely to believe that the jurisdiction might be liable, followed by Utah, Alaska and California.



PART IV:

TORT LIABILITY AS A SAFETY INCENTIVE

The analysis of the effectiveness of tort liability as a safety incentive has been broken into three separate questions:

- what motivates local governments to act to reduce earthquake hazards?
- what are the factors reducing the effects of current liability rules on earthquake safety measures?
- what are the interrelationships of liability, risk management and insurance, as well as what are their impacts on earthquake hazard reduction?

This part of the Guide focuses on each of these questions.

A. MOTIVES FOR EARTHQUAKE SAFETY

Theory

As part of the research conducted on the liability of the private sector for earthquake hazards and losses, several theoretical motivations for earthquake safety were discussed. The discussion in the following two paragraphs is based in part on that research.

First, ***tort liability*** may be used to promote safety of a local government's OWN facilities. Presumably, in those instances where tort law is so used, the cost of taking the measures which would have avoided the harm or damage is weighed against the benefits from such measures. If the cost exceeds the benefits, negligence law would find no liability since society would not wish to encourage an inefficient use of resources. On the other hand, if the benefits outweigh the risks and the step has not been taken, tort liability would be imposed in order to encourage that local government take the necessary measures. In theory, therefore, the presence of tort liability acts as a motivation for earthquake safety.

However, such a motive has limited usefulness for a governmental agency. Unlike a private business, society supposedly desires that government protect the public welfare. Therefore, the motive of ***altruism*** should play a major role, particularly if local elected officials view their role as a protector of the public welfare. Theoretically, local governments have a natural desire for ***self preservation***, that is, to avoid injury to itself, its employees and its property. ***Regulatory requirements*** can serve to provide a minimum standard whereby negligence in operating a public facility can be judged. State and federal legislation and regulations may also mandate local governments to prepare inventories and plans related to private sector activities. Finally, there should be an ***economic incentive*** to protect private property in the local government's jurisdiction to provide a tax base. These other factors may render tort liability less significant as an incentive for taking safety measures.

Survey results

The interview and survey responses enabled project staff to develop four measures of an "active" earthquake program:

- a hazardous building/retrofit program;
- special requirements for nonstructural components;
- land use and study requirements for "sensitive areas"; and
- any earthquake-related policies causing proposed development projects to be canceled or significantly changed.

After comparing each of these four measures of an "active" earthquake program to measures of earthquake risk, it was concluded that higher risk does result in more active earthquake programs.

The interview data showed that even though earthquake events can ***trigger*** the initiation of programs, this is also an incomplete picture of the motivation process.

Thus, the managers surveyed were asked to rank ten other possible factors based on their relative importance in motivating earthquake hazard reduction programs in their own jurisdiction. The result was:

1 - Person on staff or elected official acting as leader
2 - Need to maintain local government functions
3 - Concern for potential liability
4 - Altruistic goal to improve public safety
5 - Action required by state or federal government
6 - Desire to avoid economic loss or loss of tax base
7 - Desire to avoid personal injury or injury to fellow employees
8 - Active risk management program
9 - Public image from acting, or not acting, reasonably and subsequent media coverage
10 - Improve employee morale

An attempt was made to determine if liability was a larger or smaller motivator among those who had more active earthquake programs. Therefore, the ranking of these motivations was compared between those who had and had not disapproved or significantly changed a proposed development project for reasons of seismic safety. Liability was tied for ***first*** (with leadership) among those who had experienced such a project change. Liability was tied for ***second*** (following public safety) among those with active land use regulations related to earthquakes. However, it was ranked as ***fourth*** among those with structural retrofit and nonstructural programs.

> ***Cities only do things because they have to ... that is, because of regulations or liability.***
> Anonymous local government official

Two other observations are significant. First, liability was listed first very few times versus three other motivators: a leader, public safety, and a requirement. It achieved its high ranking through the ***pervasiveness*** of this issue, particularly among those who had developed programs which were affecting projects.

The second observation: there is no pattern of a ***single*** motivator for earthquake programs from jurisdiction to jurisdiction. The variety of responses accurately reflects the variety of processes for developing these programs observed in the interviews.

The survey confirmed that some non-liability incentives are more significant than tort liability in safety enhancement. This does not mean that liability is not a factor in decisionmaking, however.

B. FACTORS REDUCING EFFECTIVENESS OF LIABILITY RULES ON EARTHQUAKE SAFETY MEASURES

Theory

Any theoretical analysis of tort liability rules as a safety incentive must also consider some of the deficiencies inherent in such a system. The research conducted on the liability of the private sector for earthquake hazards and losses proposed five such deficiencies which are reproduced in the next five paragraphs for the sake of comparison.

First, tort liability ***rules are uncertain*** at any given moment and in a state of continuing change. To a certain extent, this uncertainty in inherent in any system which rests on an after-the-fact analysis of individual cases. However, tort law is also uncertain in that it can impose liability in areas where no liability previously existed. To that extent, there is true uncertainty as to whether liability is a concern when the defendant in acting in a certain arena.

Second, the theory of negligence law operates on the assumption that the defendant has considered the probability and severity of the risk incurred and has evaluated the advantages and disadvantages of the available alternatives. This may not be possible or practical due to the costs of gathering and ***availability of information***. Therefore, a vast number of decisions are made without the full analysis upon which this theory of negligence law is based.

Third, there are problems of ***rationality and inadvertence***. The theoretical model assumes that the defendant acts in a rational manner and that there are no truly accidental or inadvertent actions. Some individuals are not able or inclined to make the kinds of calculations which are basic to the use of tort law as a safety incentive. Moreover, even individuals so inclined may very often find values that cannot be rationally included in the tort law calculation or may inadvertently fail to recognize certain risks. In these situations, tort law provides no safety incentive.

Fourth, in certain circumstances, such as permanent disability and death, there may be problems of ***determining damages*** for the damages awarded do not fully compensate the plaintiff for the harm incurred. Thus, tort law will provide an inadequate incentive for safety when a defendant's conduct creates a risk of death or injury.

Finally, the use of tort law as a safety incentive does not explicitly take into account the ***costs of utilizing the judicial system*** to recover damages for injury or harm.

Survey results

Understanding rules

Local attorneys who responded to the survey believe that their jurisdiction's policy makers have an understanding of general liability issues, but only understand half of the specific concepts related to liability. The concepts best understood are:

- that public officials and employees are entitled to a defense and indemnity if sued for actions undertaken in the course and scope of employment (except in rare instances).

- the significance of notice rules regarding dangerous conditions of public property.
- the extent of potential liability for building permits issued and denied.
- the extent of potential liability for inspections of private property and corrective actions taken or not taken.

Moderately well understood concepts included:

- the extent of potential liability for misrepresentations of public employees.
- the extent of potential liability for mandatory duties imposed by enactment.

Least well understood concepts included:

- the discretionary immunity and the distinction between discretionary and ministerial functions.
- the implications of changed conditions of public property.
- limitations upon the design immunities in their state's Tort Claims Act.
- the extent of potential liability for drafting and/or implementing emergency response plans.

Uncertain rules

In the survey, both managers and attorneys were asked about the uncertainty of the tort liability system and its effects. Two-thirds of the managers and three-quarters of the attorneys believed that the law is ***sometimes uncertain***. An additional 22% of the managers and 17% of the attorneys believe that the law is always uncertain. Those that felt that uncertainty always or sometimes existed were asked what effect this uncertainty was having on their jurisdiction. Many felt that the uncertainty was having little or no effect on local government decisions (48% of the managers and 36% of the attorneys). A quarter felt that the uncertainty has discouraged aggressive local government actions to solve public problems (21% of the managers and 38% of the attorneys). About one-quarter felt that it contributed to the solution of public problems through concern for liability on the part of local governments (25% of the managers and 20% of the attorneys). Only a small number felt that it contributed to the solution of public problems through ***unwarranted*** concern for liability on the part of local governments (4% of the managers and 2% of the attorneys). The remainder (3% of the managers and 4% of the attorneys) noted other effects of the uncertainty. Managers from jurisdictions which had most types of "active" earthquake hazard mitigation programs are more likely to believe that this uncertainty is ***encouraging*** action.

Concern for liability

Two-thirds of local government managers and three-fifths of the attorneys have observed concern for liability for earthquake hazards within their jurisdictions, double the number of ten years ago. Those managers from jurisdictions with most types of "active" earthquake programs are even more likely to have observed this concern. This finding is interesting because it indicates that an increase in ***concern*** for liability, rather than the perceived ***extent*** of liability, motivates earthquake mitigation programs.

C. LIABILITY INSURANCE AND RISK MANAGEMENT

Theory

The tort negligence system tolerates, and in some instances encourages, use of liability insurance. By relieving the insured of the immediate burden of liability, such insurance generally greatly weakens the deterrence value of the negligence liability rule. The extent that insurance actually reduces the incentives that would operate in the absence of insurance is well documented in the economic literature, where it is referred to as the problem of ***moral hazard.*** The private sector liability report documents four ways to theoretically reduce this impact, including self-insurance, high deductibles, a policy of basing premiums on the insured's past record, and basing premiums on inspections of the insured's property.

Survey results

Because of these theoretical relationships, both the survey and the in-person interviews attempted to establish the actual extent to which this moral hazard problem could be documented.

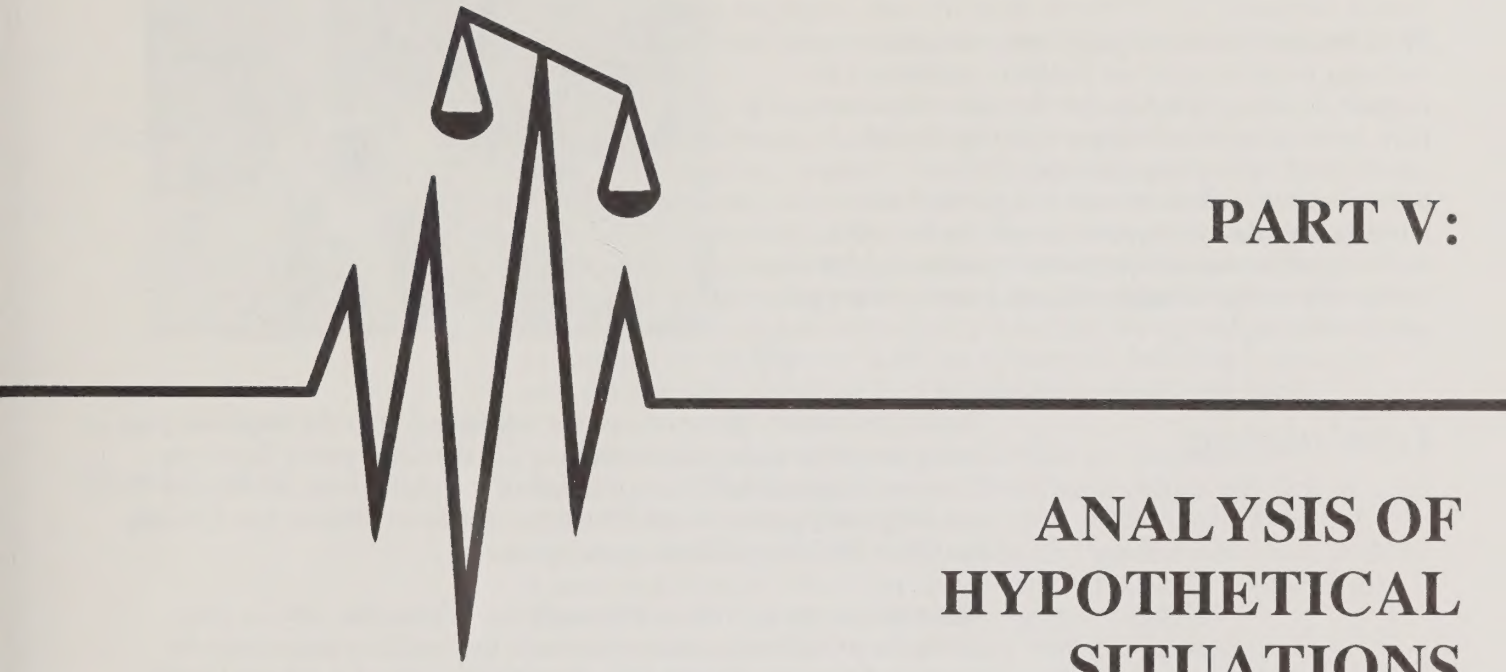
Three-fifths of local government staff believe their jurisdictions have an "active" risk management program. Half had initiated the program while insured by a private company. Most (82%) of those NOW self-insured that had initiated a risk management program while purchasing private insurance believe that the change in type of insurance had caused their risk management program to become more active. Those with "active" earthquake programs tend to be self-insured and have active risk management programs.

This correlation, which was expected given the theoretical relationships described above, led to several follow-up questions in the interviews. Unexpectedly, there was a widespread belief that type of insurance and risk management were NOT critical in motivating earthquake hazard reduction programs. Project staff then searched for some other explanation for the relationship.

The conclusion was that the existence of active risk management programs ***and*** active earthquake programs are both the result of a progressive top management and stable elected bodies promoting safety awareness, rather than the risk management programs somehow "causing" the earthquake program to be more active.

Interviews with six municipal insurance pools revealed that all were aware of potential liability for earthquake hazards and losses. Most had resources for mitigating such losses and hazards. However, these resources were under-utilized for a variety of reasons, including other priorities and the perception that the pool should respond to requests for assistance rather than initiate programs.

> ***If the insurance broker gives advice, this is not as important as if it came from a member of the public, which, in turn, is not as important as if it came from a staff risk risk manager; the staff risk manager has been hired specifically to give this type of advice.***
>
> Anonymous local government official



PART V:

ANALYSIS OF HYPOTHETICAL SITUATIONS

Since one can better understand liability concepts through the use of examples, this section analyzes several hypothetical situations in terms of the possible theories available to a potential plaintiff in claiming tort liability against local governments. The analysis draws upon the legal theories previously discussed as well as some of the findings from the surveys of and interviews with local government officials. These hypothetical situations focus on earthquake liability and earthquake safety issues. Other bases for tort liability may exist in a situation but will not be analyzed.

At the end of each situation, the section on "How to cope..." provides some advice for promoting earthquake safety while reducing liability exposure.

Hypothetical Situation 1: BUILDING INSPECTOR RESPONSE TRAINING

The city's written earthquake response plan includes provisions for its building inspectors to inspect buildings after an earthquake. However, they never receive training on how to do this specialized type of inspection and never participate in a disaster exercise prior to the earthquake. An earthquake occurs and some buildings that should have been condemned are not, while others that should not have been condemned, are torn down.

Legal analysis

Three preliminary assumptions are necessary: (1) the response plan is being prepared under a state statute; (2) the Emergency Services Director responsible for preparation of the plan never invites the building staff/inspectors to disaster response exercises; and (3) only the Chief Building Official participates.

Three issues are central to this analysis: (1) can the city be held liable for its failure to train or include the building inspectors in disaster exercises; (2) can the city be held liable for the negligent inspections; and (3) is there an applicable immunity?

Alaska

In those cases where no immunity applies in Alaska, the injured parties will have a difficult time trying to establish that the failure to train the inspectors and have them participate in the disaster exercises proximately caused the damage. The injured party must present evidence that had the building inspector in question been trained or had participated in the disaster exercises, he/she would have concluded that the building should not be demolished.

On its face, the statutory emergency response immunity in Alaska is not applicable to programs required by statute as opposed to those undertaken under an agreement/contract with the state. Therefore, neither the failure to train or practice nor the negligent inspections would be shielded.

The Director's failure to require building inspectors to be trained or participate in disaster exercises does not appear to be immune as a discretionary function. There are no obvious policy issues which would inform these decisions. Therefore, if the legal theory for recovery can be sustained, there is no immunity for the city's failure to train or to require participation in disaster exercises. The negligent inspections would certainly not fall within the immunity.

With regard to the inspections, the pivotal question is the scope of the statutory building inspection immunity in Alaska. Clearly, the failure to detect and abate hazards in unsafe buildings is immune. Less clear is the availability of the immunity for demolition of sound buildings which results from negligent inspection. There is no failure to detect a hazard, but rather a detection of a non-hazard.

California

In California, as in Alaska, any claims based on the failure to train building inspectors, or require building inspectors to participate in disaster exercises, must overcome the problems of proving a breach of duty and proximate cause. In California, the city is immune from claims based on negligent inspection of the building. However, it may be liable in inverse condemnation for wrongfully demolished buildings.

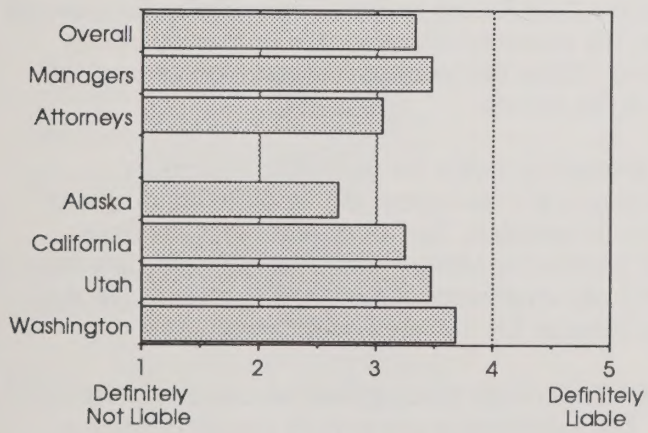
Utah

In Utah, the city is immune under Utah law for tort damages arising out of its inspection of the buildings. However, the demolition of sound buildings may expose the city to inverse condemnation claims. The Director's failure to train building inspectors or to require building inspectors to participate in disaster response exercises does not appear to be protected by statute. Further, the discretionary immunity would not appear to be applicable. Again, the question turns on whether there is a breach of duty owed to the injured parties which is violated by the Director's failure to train the building inspectors and whether this breach of duty proximately caused the harm.

Washington

In Washington, none of the city's activities are immune as discretionary functions. However, the injured parties will have a difficult time meeting the public duty test. There are no facts in this scenario which would indicate that any specific enactment creates a protected class to which the city would owe a duty violated by its inspection activities or the Director's failure to require participation in disaster exercises or to train the inspectors. In limited factual situations there may be sufficient contact between specific building inspectors and individual owners of property incorrectly demolished, or those injured by unsafe buildings, to establish a special relationship and some liability exposure.

How is liability perceived?



Those responding to the survey conducted as part of this project believed that the city "might or might not" be liable, with the managers leaning more toward liability than the attorneys. The discrepancy between the managers and the attorneys may, in this case, be caused by attorneys being more aware of the statutory immunities available and difficulties in proving proximate cause.

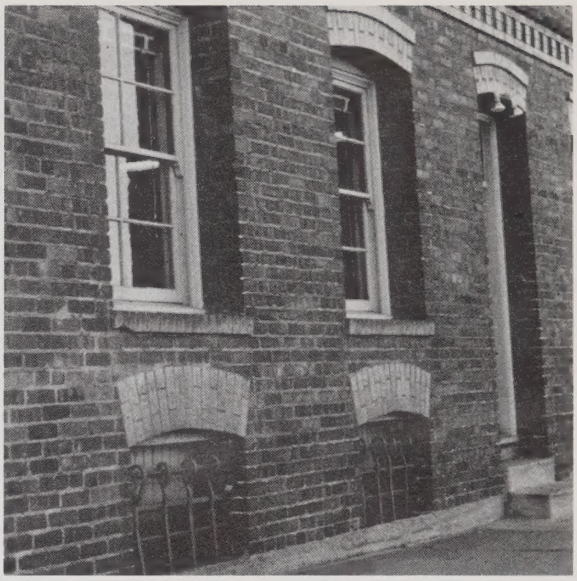
Those from Washington were most likely to see the potential for liability, while those from Alaska were least likely to see potential liability.

How to cope...

City officials should stress proper training of both emergency and NON-emergency personnel, as well as exercising of emergency plans to their department heads. Procedures taught in training classes should be followed. Training classes may include information on how to minimize liability exposure commensurate with effective emergency response. Cities should make the most of any statutory immunities available to maximize response. Such immunities are quite extensive, except in the State of Washington.

Hypothetical Situation 2: HAZARDOUS BUILDING LEGISLATION

A county makes a decision based on fiscal constraints not to comply with a California law (SB 547) requiring it to identify all unreinforced masonry buildings (with certain exceptions, including single-family homes). The owner and his customers are severely injured in a moderate earthquake in one of these buildings. The owner claims that he would have retrofitted the building had he been notified that a problem existed.



Legal analysis

Two assumptions are necessary for the analysis to proceed: (1) there are statutes comparable to California's SB 547 in each of the four states (not true, but assumed for purposed of this analysis); and (2) the local government analyzed its revenues and the program costs before reaching a reasonable conclusion that it did not have sufficient funds to undertake the inventory activities mandated by the state statute for the then current fiscal year.

The issue central to this discussion is whether a local government can be held liable in tort for its failure to undertake a state-mandated earthquake hazard reduction program.

Alaska

Absent the statutory mandate, clearly local governments in Alaska would NOT be liable for their failure to identify unreinforced masonry buildings. Moreover, the statutory discretionary immunity clearly applies to this situation. Thus, the local government is immune for failure to comply with the statute.

California

In California, a public entity is liable for its failure to comply with a mandatory duty unless it has exercised "reasonable diligence" to discharge that duty. In addition, the injury which results from the local government's failure to comply with a mandatory duty must be of a type against which the enactment is designed to protect. In this situation, the requirements of SB 547 are clearly mandatory.

The harm suffered MAY be of the type against which the statute is designed to protect. The statute does not require the retrofitting of buildings. Therefore, its primary purpose is to inform and educate property owners. A foreseeable, and desirable, result would be remedial action by the property owner. There is no reported case which would help determine if this apparent but secondary purpose of the statute is one on which the plaintiff can base a claim that the statute was "designed" to protect against the injuries and damages which would result from an unreinforced masonry building failure in an earthquake.

The next question is whether the local government has exercised reasonable diligence in the discharge of its duty. In this situation, the local government's use of due diligence to locate existing funds or to seek new funds are presumed facts. Therefore, the immunity ought to apply. However, if funds become available in the future, it will be unreasonable for the local government to refuse to comply and the immunity would no longer apply.

Even if the mandatory duty doctrine applies, it may be very difficult for the injured party to prove that the failure of the local government to inventory the affected building proximately caused the injury which occurred. First, he would have to prove that he would have retrofitted the building. Second, he must prove that the retrofit would have prevented the particular harm which is the subject of the lawsuit.

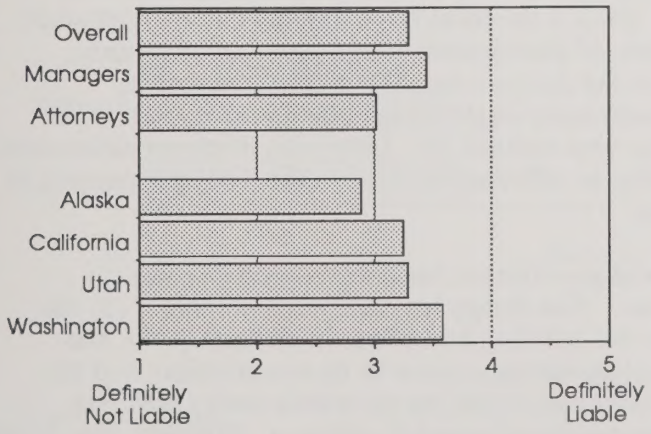
Utah

In Utah, subject to statutory exceptions, the local government is immune from tort liability for "governmental functions", including its refusal to comply with the statutory requirement. If the decision not to comply is made by the legislative body of the local government, there appears to be no applicable statutory exception and the immunity is absolute. In the highly unlikely event that the refusal to comply with the statutory requirement is made by a public employee, then the refusal to comply would have to qualify as a discretionary function in order for the local government to be immune.

Washington

The presumption that the action of the local government is based on a considered evaluation of fiscal constraints brings the action within Washington State's test for the discretionary function immunity. Thus, the local government's failure to comply with the statute is immune.

How is liability perceived?



Both the managers and the attorneys responding to the survey conducted as part of this project leaned toward the belief that the county probably might be liable.

Again, those from Washington were most likely to see the potential for liability, while those from Alaska were least likely to see potential liability. Interestingly, the legal research clearly finds that the county almost positively will not be liable, except in California, where it might or might not be liable.

How to cope...

The costs of complying with the program should be weighed against the costs of defending a likely lawsuit combined with the obvious benefit of improved public safety. Except in California, there should be very little concern about liability. In California, the fiscal constraints should be well documented not only in the year of the decision, but in each subsequent year.

Hypothetical Situation 3: CHANGED CIRCUMSTANCES FOR PUBLIC BUILDINGS

A local government building is known to be a collapse hazard in an earthquake. The government funded a study 10 years ago and its consultants determined that the cost of strengthening the building was several million dollars, an amount deemed unreasonably large by the elected body. An earthquake occurs; deaths and injuries result. At the trial, expert witnesses testify that a new technology had become available 18 months before the earthquake that would have strengthened the building for a fraction of the previous estimate.

Legal analysis

Two additional assumptions have been made in order to proceed with this analysis: (1) the original design of the building was approved by the elected body; and (2) the original design was not defective by engineering standards then in effect.

In this analysis, it is important to examine two issues: (1) can the local government be held liable for its failure to retrofit the building ten years ago; and (2) can it be held liable for its failure to take advantage of the newly developed technology?

Alaska

In Alaska, attempts to shield decisions regarding the design of a public facility under the discretionary function immunity have been consistently rejected. However, it should be noted that in none of the reported cases was the actual design decision made by an elected body nor was the issue related to retrofit/repair. In this situation, the decision not to retrofit appears to fulfill the requirement that policy and resource allocation must be issues for the discretionary immunity to apply. Even if the local government is able to persuade the court on the merits of distinguishing this case from the other "design" cases where the design immunity was rejected, it is conceivable that government might be held liable for its failure to take advantage of the new technology. However, there are no reported Alaska cases imposing an affirmative duty on the local government in this type of situation.

California

In California, the local government building is probably in a "dangerous condition." The design immunity is available if (1) the design which makes the building hazardous in an earthquake was approved by the local government prior to its construction, and (2) that design was actually considered by the public entity AND its decisions were supported by substantial evidence. However, the design immunity may be defeated by "changed conditions," that is, changes in the use or physical condition of the building which make it in a "dangerous condition." In this situation, the "changed condition" consists of the local government's awareness of the problems and its decision not to retrofit the building. To defeat this liability, the local government must show reasonable and diligent efforts to solve the problem, by, for example, making engineering studies, locating funds, posting warning signs, or reducing use to minimize danger. The

fact that a more cost-effective engineering solution becomes available prior to the earthquake does not automatically defeat the immunity; rather, it is viewed as part of the efforts of the local government to remedy the problem using reasonableness and diligence.

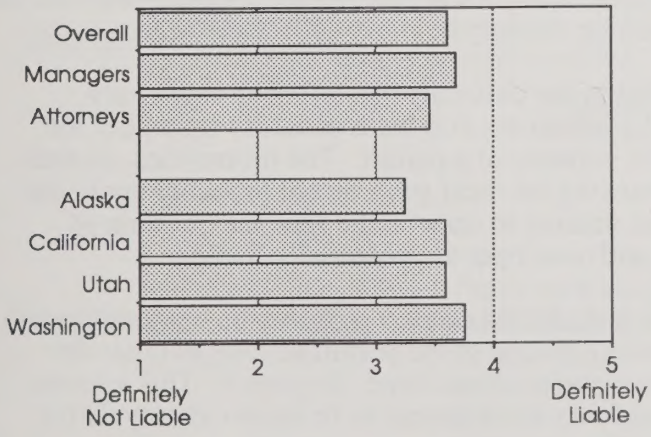
Utah

In Utah, the immunity for harm caused by the dangerous condition of a defective building has been waived, except for "latent defects." The problem is not "latent." Next, the local government might argue that the building is not in a "dangerous condition" because it is perfectly safe if an earthquake does not occur. The local government could also argue that it has no duty to make the building safe in light of the current level of geologic and engineering knowledge. In addition, although the design immunity has been rejected in Utah, the local government could make the same arguments discussed for Alaska, that is, that the decision not to retrofit involves considerations which fall within the underlying policies of the discretionary immunity.

Washington

In Washington, there is no statutory basis for a defense. In addition the courts have both rejected attempts to immunize design decisions and design immunity arguments where the design choice was driven by traditional planning-type criteria. The only question is whether the local government had a duty to make the building safer and whether its failure to do so proximately caused the harm. The public duty doctrine apparently is not an issue in public facility cases, perhaps due to special duties owed by a landowner to individuals on the land.

How is liability perceived?



Both the managers and the attorneys responding to the survey conducted as part of this project leaned toward believing that the local government probably might be liable.

When comparing the responses from state to state, those from Washington were most likely to see the potential for liability, those from California and Utah were near the mean, and those from Alaska were least likely to see potential liability. These responses are not consistent with the legal analysis, which indicates that local governments in California, though still having a potential liability exposure, are in the best position to structure their decisionmaking process to maximize the likelihood that they would not be liable.

How to cope...

In all four states, a local government is prudent if it remains abreast of the condition and safety of its facilities. In California, it is particularly important that the local government use and document reasonable and diligent efforts to solve problems, by, for example, making engineering studies, attempting to locate funds, examining the feasibility of posting warning signs, or changing or reducing building use to minimize danger. In Alaska and Utah, local governments should ensure that elected officials consider and make these types of decisions. This maximizes the likelihood that the discretionary immunity would apply.

Hypothetical Situation 4: NEW CONSTRUCTION AT A PROBLEM SITE

The local government approves a residential development in an area that the developer's consultants have noted has potential problems because of the foundation materials and proximity to a known active fault. The developer has modified the project by avoiding specific known hazardous locations (including an active fault trace as specified in California's Alquist-Priolo Special Studies Zones Act) and constructing smaller buildings of wood rather than concrete high rises. The buildings constructed comply with the building code in force at the time of construction. The remaining risk is thought to be acceptable. Damage and injuries occur after the earthquake in spite of these precautions.

Legal analysis

For this hypothetical situation, it will be assumed that (1) non-California jurisdictions have either locally prepared fault maps or that a state department or agency has fault maps available, either of which show an active fault trace near the development; and (2) that a more "state of the art" building code was issued and adopted by the local government or imposed by the state shortly after the issuance of the building permit.

The issue which will be examined is whether the local government can be held liable for issuing the permit.

Alaska

In Alaska, in addition to the judicially prescribed discretionary immunity, the local government also has a statutory immunity for claims arising out its issuance of a permit. The immunities, on their face, are absolute, making the local government probably not liable. (This conclusion has nothing to do with the separate question of whether the owner and developer are potentially liable.)

California

A local government in California would probably be immune for any claim arising out of its issuance of the permit so long as it has the discretionary power to issue, or not issue, the permit. This appears to be the case. In addition, there appear to be no mandatory duties that might overcome this immunity.

Utah

In Utah, the statutory immunity for permit issuance is absolute on its face. There is no indication that the local government did anything which would overcome this immunity.

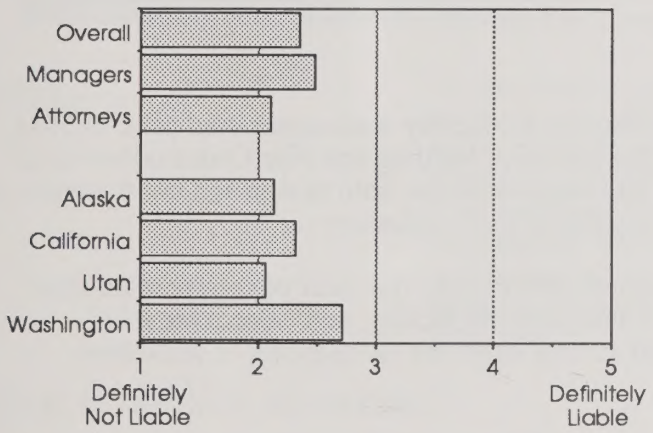
Washington

The analysis is quite different in Washington. Apparently, the only defense to liability is the public duty doctrine. Under this doctrine, two arguments may be advanced by those injured. (1) They have had direct one-to-one contact with the local government which led them to rely on the local government for the safety of the building. (2) They are members of a class to be protected from earthquake-related harm by the fault mapping enactment (assuming one exists) or the building code's seismic safety aspects.

Using this second argument, the builders of the Washington development can recover damages if they can prove negligence in the local government's issuance of the permit. However, occupants of the building may recover only if there is negligence in issuing the permit based on the fault map. Current technological information places as much emphasis on soil type as on proximity to a fault as an indicator of seismic safety. Therefore, aside from a negligent reading of the fault map, or negligent preparation of the fault map which causes a house to be built spanning a fault, it may be difficult for an injured party to prove that the negligence caused any damages.

The current Uniform Building Code requirements may not represent the safest solution to the seismic problem at the site. However, the adoption of UBC standards by the Washington jurisdiction is probably immune as a discretionary function. Therefore, whether the current standards are the "best" standards is irrelevant.

How is liability perceived?



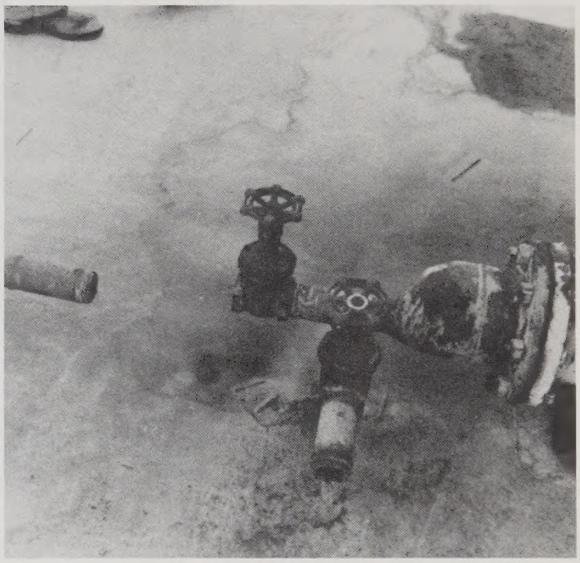
Of the five hypothetical situations, liability was believed to be least likely in this set of circumstances. Again, the managers believed that liability was more likely to exist than the attorneys.

Those from Washington were most likely to believe that the jurisdiction might or might not be liable, while those from the other states leaned toward the local government not being held liable. These perceptions are fairly close to those of the legal researchers.

How to cope...

Those reviewing development projects and issuing permits are good potential candidates for employee training on appropriate procedures for enforcing local ordinances or issuing building permits, as well as on liability issues. Except in Washington, there should be very little concern about potential liability on the part of the local government. This does not mean that the developer, his design professionals, and the builder will be afforded the same immunities.

Hypothetical Situation 5: STORAGE OF HAZARDOUS MATERIALS



The local government has on-site storage of hazardous materials. The storage conforms to all pertinent State and local regulations. These standards do not require secondary containment facilities for above ground containers. Earthquake resistant design criteria and hazardous materials storage requirements as specified in the Uniform Building and Fire Codes have been met. A major earthquake occurs, some storage vessels rupture, and some pipelines and pipe-vessel connections fail. Some of the materials contaminate the air; others leak into storm drains, sewers and the ground. Illnesses, fish kills, and sewage treatment disruption occur due to the air and water pollution. Two months later, water supply agency monitors determine that their ground water resources have been contaminated for an indefinite period.

Legal analysis

It will be assumed that (1) the facility was constructed prior to 1985 when a change in the Uniform Building and Fire Codes occurred, (2) the local government was responsible for both design and construction, and (3) there were no applicable local ordinances.

The important questions are: (1) can the local government be held liable for negligent design of the facility, and (2) can the local government be held strictly liable for its handling of hazardous materials?

Alaska

(1) Alaska has no applicable statutory immunity. In addition, the kind of factors which would usually be considered in specifying the type of storage containers and piping would not qualify the decision for the discretionary immunity. Thus, the relevant question becomes whether the design of the storage facilities is negligent. In the absence of an immunity, the local government will be treated like a private individual for the purpose of determining whether its actions were negligent. Professionals (such as architects and engineers) will be judged by the standard of care used by other members of their profession in the same or similar localities. Under general tort principles, compliance with regulatory standards does not bar a finding of negligence, although violation of such standards creates a presumption of negligence.

(2) Since Alaska abolished general sovereign immunity, subject to specific statutory immunities, local governments are theoretically strictly liable if the storage of hazardous materials is characterized, under Alaska law, as an ultrahazardous activity. In this respect, the postures of local governments and the private sector are the same.

California

(1) California retains sovereign immunity subject to statutory liability. Therefore, those injured must prove that the facility was in a dangerous condition. The issues surrounding whether the facility is dangerous are the same as those described in the above analysis of whether the local government is negligent in Alaska. The design immunity is available.

(2) There is no statutory liability for ultrahazardous activities in California. Therefore, there does not appear to be a basis for imposing strict liability in this situation. However, the local government can be held liable for property damage under a claim of inverse condemnation. Since liability for inverse condemnation is imposed on mere proof of causation, without proof of fault, it resembles strict liability in practice. For example, if a culvert on a hillside, which is in good repair, releases impounded water in an earthquake, a local government which owned, operated, or designed the culvert will be liable for damage to downstream properties.

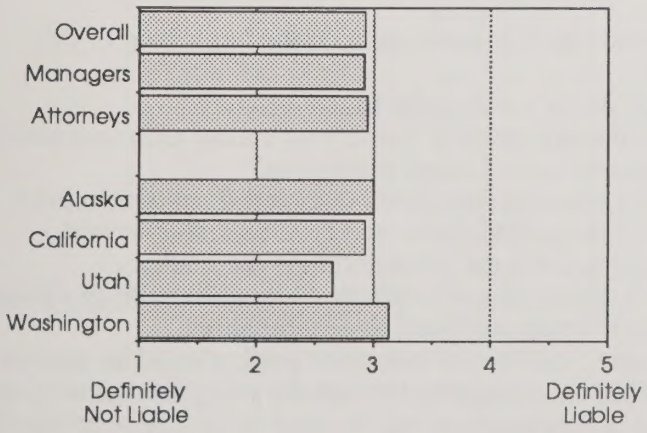
Utah

The analysis under Utah law is the same as under California except that the design immunity is not available. Instead, the local government may try to assert that the defect is latent. There are no relevant cases testing this assertion, however.

Washington

No immunity is available under Washington law. However, it may be difficult to establish liability under the public duty rule. Statutes and regulations which could be the bases for the finding of a special relationship between the local government and injured parties have not been violated. Nothing in this scenario suggests that a special relationship, based on direct contact between the local government and any injured party, can be established. Even if strict liability is imposed, it seems probable that the injured party must meet the public duty test.

How is liability perceived?



Both the managers and the attorneys believed that the local government might or might not be liable, depending on the situation.

Those from Washington were most likely to believe that liability might exist, followed by Alaska, California and Utah. The responses are quite consistent with the results of the legal analysis.

How to cope...

Local governments should monitor the condition and safety of their facilities, particularly those designed and built a number of years ago. The costs of inspection and maintenance can be viewed as being offset by the costs of defending and paying liability claims against the city.

PART VI:

APPROACHES FOR PROMOTING SAFETY USING LIABILITY

Two of the major questions that were asked at the beginning of this research effort were:

- should liability for earthquake hazards exist?
- can we use the existence of liability as a more effective tool for promoting earthquake hazard mitigation?

The answers to these questions have been obtained from two sources, legal theory and the responses of those surveyed and interviewed. Based on these analyses, three recommendations are made.

1. ABAG and others should continue to provide liability education to local government staff and decisionmakers.
2. The increasing number of insurance pools should be used as a valuable asset in promoting earthquake mitigation strategies.
3. In-house risk managers should be used as an ally in promoting liability education, earthquake hazard mitigation programs, and safety analyses of local government facilities.

A. APPROPRIATENESS OF TORT LIABILITY FOR EARTHQUAKE HAZARDS

Legal theory

As stated in the Introduction, tort liability has its roots in English common law, where it may have developed to achieve fairness on an individual basis. Although the underlying motives are not clear, they may have included compensation of the victim, punishment of the person who committed the tort, and abstract concepts of equity. By the Twentieth Century, tort law was seized upon as a means of promoting safety. This use of tort law is not necessarily incompatible with other statements of tort law's purpose.

This research on liability theory, originally conducted as part of an earlier NSF-supported project on the liability of private businesses and industries for earthquake hazards and losses, was supplemented with survey and interview data on the appropriateness of tort liability for earthquake hazards.

Survey results

First, those surveyed were asked if a local government ***should*** be held liable if it fails to initiate corrective or preventive measures and causes or makes more likely loss of life or property damage resulting form earthquake hazards on ***public property***. Approximately half of the managers believed that liability should depend on the situation. However, more managers believed that the local government should be liable (one-third) than thought that the local government should not be liable (one-sixth). On the other hand, three-fifths of the attorneys believed that liability should depend on the situation, with the remainder being fairly evenly split between those that believed the local government should be liable and those that believed that it should not be liable. In all cases, slightly fewer managers and attorneys believed that liability should exist than believed that liability did exist (see Part III, Section A).

In a second question, those surveyed were asked if a local government ***should*** be held liable if it fails to initiate corrective or preventive measures and causes or makes more likely loss of life or property damage resulting from earthquake hazards on ***private property***. Half of the managers believed that liability should not exist, while two-fifths felt that liability should depend on the situation and only one-tenth felt that liability should exist. Even more attorneys (three-quarters) believed that liability should not exist, while one-fifth felt that liability should depend on the situation and only one-twentieth felt that liability should exist. In all cases, slightly fewer managers and attorneys believed that liability should exist than believed that liability did exist (see Part III, Section B).

Thus, while both legal theory and the perceptions of those surveyed support the idea that liability is an appropriate tool for promoting earthquake safety, there is no significant support for increasing the current degree of liability.

> ***Liability is seen as a way to get political leaders off the dime. It's always more convenient to blame the state for requiring a program.***
> Anonymous local government official

B. POTENTIAL FOR INCREASING THE EFFECTIVENESS OF LIABILITY AS A TOOL FOR PROMOTING EARTHQUAKE SAFETY

In an attempt to determine support for and reaction to possible changes in liability rules, the design professionals and company officials surveyed and interviewed were asked a series of questions.

General changes

All those surveyed were asked the following general question:

> *Assuming that more local government action is desirable to reduce earthquake hazards -- which option do you think would be the most effective in encouraging such action?*

The managers tended to believe that increasing liability would be more effective than decreasing it. Provided with the following three alternatives, the managers responded:

- **increasing** local government exposure to liability (45%);
- leaving **current** degree of local government exposure (34%); and
- **decreasing** local government exposure to liability (21%).

The responses of the attorneys leaned strongly toward decreasing liability, with the following breakdown of responses:

- **increasing** local government exposure to liability (16%);
- leaving **current** degree of local government exposure (29%); and
- **decreasing** local government exposure to liability (56%).

The attorneys were asked, in an open-ended question, to describe how **they** would change tort rules to increase local governments' efforts to reduce earthquake hazards.

- 20 attorneys responded by describing ways to increase immunities, particularly for actions **taken** to mitigate earthquake hazards (including warning and evacuation programs, public education, requiring seismic safety standards for buildings, inspections for earthquake hazards, land use regulations, and other *reasonable* programs not involving gross negligence)

- 10 attorneys recommended no change, often due to a perceived low level of effect of tort rules on local government behavior; and

- Only one attorney recommended an increase in liability, in this case for a **failure** to take action.

Increasing liability

The managers and attorneys were both asked what the effect of increasing liability would be if, by statute, a local government were explicitly declared liable for its failure, intentional or unintentional, to take actions to reduce earthquake hazards. Both the managers and the attorneys tended to believe that the local government probably would do more than now. Interestingly, **no one** felt that the local government would **definitely** do less than now and only one person felt that the local government would **probably** do less than now.

In addition, both the managers and the attorneys were asked if they **personally** favored increased liability exposure as a means of encouraging local governments to reduce risks from earthquake hazards. Overall, four-fifths did **not** favor such an increase, with more attorneys (92%) being against such an increase than managers (77%).

Decreasing liability

The attorneys were asked to "predict" the effects of two reductions in liability on local government activities specifically related to earthquake hazards.

First, they were asked: if your local government were assured of immunity for **actions taken** to reduce earthquake hazards, what would result? Two-thirds believed it would do about the same to reduce earthquake hazards as it is doing now; one-third believed their jurisdiction would do more; and no one believed that their jurisdiction would do less.

Next, they were asked: if your local government were assured of immunity for **failing to act** to reduce earthquake hazards, what would result? Nine-tenths believed it would do about the same to reduce earthquake hazards as it is doing now; one-tenth believed their jurisdiction would do more; and 2% (one person) believed that their jurisdiction would do less.

Interview perceptions

Those interviewed made several perceptive comments on the effects of changes in liability rules.

Those believing an increase would be most effective mentioned it as a way "to threaten elected officials," "to get political leaders off the dime," and "to get the management hierarchy in gear."

Those believing a decrease would be most effective were especially interested in placing the burden for privately-owned hazardous buildings more clearly on the private building owner and for providing local governments a "carrot" to act on both unreinforced masonry and other hazardous buildings.

Those believing that the liability rules should remain unchanged did so because they believe:

- people do not change their behavior based on liability;
- liability should not be used to achieve a "political" objective;
- using the legal system allows too great an element of chance to enter the decision-making process; and
- liability might be effective, but it is not an efficient mechanism for achieving change.

Correlation between liability perceptions and "active" earthquake programs

However, there is no indication that any major change in rules governing liability or immunity would result in more active earthquake programs. This conclusion is based on two observations. First, managers from jurisdictions with "active" earthquake programs do not perceive significantly more or less liability exposure than average. Second, it appears to be concern for liability, rather than the perceived extent of liability, that motivates earthquake hazard reduction programs.

C. OTHER RECOMMENDATIONS

No clear consensus or technical justifications exists for making local governments either more or less liable to promote earthquake safety. However, several possible approaches for encouraging hazard reduction use liability indirectly.

Educate

Educating officials on liability rules should increase the effectiveness of those rules by promoting concern for the legal and economic ramifications of failing to reduce hazards. Education on hazards identification and potential mitigation improves the ability of officials to make the best public policy decision.

> ***Elected officials drive out of their rear view mirrors. If they haven't had an earthquake in five years, they aren't concerned.***
> Anonymous local government official

Use pools

The rapidly increasing number of local government liability insurance pools are a means of promoting earthquake mitigation strategies. Top-level management and elected officials attend meetings of these pools. The type of thinking which emphasizes hazard mitigation as a means to reduce hazard exposure is conducive to promoting increased earthquake safety of all public facilities and buildings. These pools can hold training sessions which could serve as a forum for providing information on earthquake hazards and mitigation, as well as on liability exposure.

Use risk manager

In-house risk managers should be used as an ally in promoting liability education, earthquake hazard mitigation programs, and safety analyses of the local governments own facilities. In jurisdictions with active risk managers, that person has supported the attorney's office on issues when the local government has a large liability exposure, particularly with safety problems associated with its own facilities. He is a staff member ***dedicated*** to calling for heightened safety awareness. The risk manager can be a "second vote" supporting a department head in management staff meetings in which maintenance and repair expenditures are being discussed.

> ***Anybody who is not concerned about potential liability for earthquake hazards in their jurisdiction didn't have 42 claims after an earthquake in their community.***
> **Bob Semple** -- former Coalinga Assistant City Manager

BIBLIOGRAPHY

Albany Law Review. "The Discretionary-Function Exemption to the Federal Tort Claims Act," a Note in Albany Law Review, Vol. 42, 1978, p. 721.

American Law Review. "Liability of Government for Issuance of Permit which Caused or Accelerated Flooding," an Annotation in American Law Review, Vol. 62, 3rd edition, 1975, p. 514.

American Law Review. "Municipal Immunity from Liability for Torts," an Annotation in American Law Review, Vol. 60, 2nd edition, 1958, p. 1198.

Borth, S.J. "Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey" in Washington Law Review, Vol. 58, 1983, p. 537.

Calabresi, G. The Costs of Accidents. 1970.

Commission on Government Reform. Final Report. Sacramento: State of California, 1979, pp. 48-50.

Festinger, L. A Theory of Cognitive Dissonance. 1957.

Hawkins. "Premises Liability After the Repudiation of the Status Categories: Allocation of Judge and Jury Functions" in Utah Law Review, Vol. 15, 1981.

Huffman, J.L. Government Liability and Disaster Mitigation: A Comparative Study. Portland: Lewis and Clark Law School, 1985.

Huffman, J.L. "Government Liability and Natural Hazard Mitigation in Japan, the Soviet Union, China, New Zealand, and the United States" in International Journal of Mass Emergencies and Disasters, Vol. 1, 1983.

Huffman, J.L. "The Government's Liability for the External Costs of Earthquake Prediction," presented at the International Symposium on Earthquake Prediction. Paris: UNESCO, 1979.

Jaron. "Does the Threat of Personal Liability Interfere with the Performance of State and Local Government?" in Urban Lawyer, Vol. 13, 1981, p.1.

Landes and R. Posner. "The Positive Economic Theory of Tort Law" in Georgia Law Review, Vol. 15, 1982, pp. 851, 875-88.

Law and Social Order. "Earthquake Danger: Need for a Viable Cause of Action," a Note in Law and Social Order. 1972, pp. 450, 452.

Meyers, M.M. "A Unified Approach to State and Municipal Tort Liability in Washington" in Washington Law Review, Vol. 59, 1984, p. 533.

Miller, H.C. "Public Tort Liability in Vertical Refuge from Hurricanes." Unpublished (1986).

Miller, H.C. "Public Tort Liability Issues in Community Lifelines." Unpublished (1986).

Minnesota Law Review. "The Discretionary Exemption and Municipal Tort Liability: A Reappraisal," a Comment in Minnesota Law Review, Vol. 52, 1968, p. 1047.

Olshansky, R.B., and J.D. Rogers. "Unstable Ground: Landslide Policy in the United States" in Ecology Law Review, Vol. 13, No. 4, 1987, p. 939-1006.

Orgill, M.S., B.M. Toren. "Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act" in Alaska Law Review, Vol. 2, 1985, p. 99.

Perkins, J.B., K. Moy and others. Liability of Local Governments for Earthquake Hazards and Losses -- Background Research Reports. Oakland: ABAG, 1988.

Perkins, J.B., K. Moy and others. Liability of Private Businesses and Industries for Earthquake Hazards and Losses -- Background Research Reports. Oakland: ABAG, 1984.

Perkins, J.B., K. Moy and others. Liability of Private Businesses and Industries for Earthquake Hazards and Losses -- A Guide to the Law, its Impacts and Safety Implications. Oakland: ABAG, 1984.

Posner, R. Economic Analysis of Law. Second edition. 1977.

Prosser, W. Law of Torts. Fourth edition. 1977.

Schwartz, G.T., and others. Legal References on Earthquake Hazards and Local Government Liability. Berkeley: ABAG, 1978.

Southern California Earthquake Preparedness Project (SCEPP). Earthquake Prediction Response: Legal Authorities and Liabilities. Van Nuys: SCEPP, 1983.

Sutter, J.H. and M.L. Hecht. Landslide and Subsidence Liability. Berkeley: California Continuing Education for the Bar, 1974, 240 p. Also, Supplement, by J.H. McGuire, C.B. Oziska, 155 p., 1988.

VanAlstyne, A. California Government Tort Liability. Berkeley: California Continuing Education of the Bar, 1964.

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